SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 194

FEDERAL TRADE COMMISSION, PETITIONER

vs.

R. F. KEPPEL & BROTHER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,
BEFORE FEDERAL TRADE COMMISSION, } ss.:

DOCKET NO. 1816.

In the Matter of

R. F. KEPPEL & BROTHER, INC.

CERTIFICATE OF SECRETARY OF FEDERAL TRADE COMMISSION.

I, Otis B. Johnson, secretary of the Federal Trade Commission, do hereby certify that transmitted herewith is a full, true and correct transcript of proceedings had before the Federal Trade Commission in the above-entitled matter, consisting of:

Part 1—Pleadings and Testimony,

Part 2—Exhibits (originals),

and separate original exhibits marked:

1	2	3
1816	1816	1816

That this transcript is certified to the United States Circuit Court of Appeals for the Third Circuit, pursuant to the filing in said court of a petition for review of an order to cease and desist, dated September 28, 1931, entered by the Federal Trade Commission in that proceeding.

IN WITNESS WHEREOF, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this twenty-ninth day of January, A. D. 1932.

(Seal)

OTIS B. JOHNSON,
Secretary.

COMPLAINT.

UNITED STATES OF AMERICA.
BEFORE FEDERAL TRADE COMMISSION.

DOCKET NO. 1816.

In the Matter of

R. F. Keppel & Brother, Inc., a Corporation.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that R. F. Keppel & Brother, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, in violation of the provisions of section 5 of the said act, and states its charges in that respect as follows:

Paragraph One: The respondent is a corporation organized under the laws of the State of Pennsylvania, with its principal office and place of business located in the City of Lancaster, State of Pennsylvania. It is now and for more than five years last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States of the United States, and causes said products when so sold to be transported from its said principal place of business in the City of Lancaster, State of Pennsylvania, into and

through other States of the United States to said purchasers at their respective points of location. In the course and conduct of the said business respondent is in competition with other individuals, partnerships, and corporations engaged in the manufacture of candies and in the sale and distribution thereof in commerce between and among the various States of the United States.

Paragraph Two: In the course and conduct of its business, as described in paragraph one hereof, the respondent sells to wholesalers and jobbers certain packages or assortments of candy.

(a) One of said assortments of candies is composed of a number of pieces of chocolate-covered candies of uniform size, shape and quality together with a number of larger pieces of candy, and/or articles of merchandise, which larger pieces of candy or articles of merchandise are to be given as prizes to purchasers of said chocolate-covered candies in the following manner:

The majority of the said chocolate-covered candies in said assortments have centers of the same color, but a small number of said chocolate-covered candies have centers of a different color. The said pieces of candy of uniform size, shape, and quality in said assortments retail at the price of 1 cent each, but the purchasers who procure one of said candies having a center of a different color than the majority of said candies are entitled to receive and are to be given free of charge one of the said larger pieces of candy and/or articles of merchandise hereinbefore referred to. The purchaser of the last piece of aforesaid chocolate-covered candies of a uniform size, shape, and quality in each of said assortments is entitled to receive and is to be given free of charge one of the larger pieces of candy or arti-

cles of merchandise heretofore referred to. The aforesaid purchasers of said candies who procure a candy having a center colored differently from the majority of said pieces of candy and the purchaser of the last piece of candy in said assortments are thus to procure one of the said larger pieces of candy or articles of merchandise wholly by lot or chance.

(b) Another of said assortments of candies consists of forty candy bars of a uniform size, shape and quality and each of said bars of candy is contained within a wrapper. Also within each of said wrappers is a slip of paper which has printed thereon the condition under which, or retail price at which, the said pieces of candy are to be procured or purchased by the consuming public. Said printed slip is effectually concealed from the consumer until he has removed the said wrapper. The conditions or retail prices printed on said slips are: (1) The bar is free, (2) The bar is 1 cent, (3) The bar is 3 cents, (4) The bar is 4 cents, (5) The bar is 5 cents, and these are the conditions or prices by which the consumer obtains the said pieces of candy from the retail merchant. The ultimate consumers thus procure pieces of candy of a uniform size, shape and quality at a price of 1 cent, or 3 cents, or 4 cents, or 5 cents, or free of charge, the same being determined wholly by lot or chance.

(c) Another of said assortments of candy is composed of a number of pieces of candy of a uniform size, shape and quality, but a small number of said pieces of candy have contained within them a sum of money. The said sums of money contained within the said pieces of candy are effectually concealed from the consumer until after he has purchased the said piece of candy and broken it apart. The said pieces of candy in said assortments retail at the price of 1 cent each, but

the purchasers who procure one of said pieces of candy having a sum of money contained therein thus procure the said sum of money contained therein as a prize and wholly by lot or chance.

Respondent furnished to said wholesale dealers and jobbers with said assortments of candies display cards to be used by retailers in offering said candies for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortments of candies are being sold in accordance with the sales plans above mentioned.

Paragraph Three: Aforesaid wholesale dealers and jobbers of respondent resell said assortments to retail dealers in various States of the United States, and said retail dealers expose said assortments for sale in connection with the aforesaid display cards and sell said candies to the purchasing public in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the respondent's sales plans hereinabove set forth.

Paragraph Four: Respondent's aforesaid practices thus tend to and do induce many of the consuming public to purchase respondent's said candies in preference to candies of respondent's said competitors because of (a) the chance of obtaining said larger pieces of candy or articles of merchandise free of charge, or, (b) the chance of obtaining one of said pieces of candy free of charge or at the price of 1 cent, or 3 cents, or 4 cents, rather than at the maximum price of 5 cents, or, (c) the chance of obtaining a sum of money as a prize.

Paragraph Five: The above alleged acts and practices of respondent are all to the prejudice of the public and respondent's competitors, and constitute unfair

methods of competition in commerce within the intent and meaning of section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this second day of May, A. D. 1930, now here issues this its complaint against the respondent herein.

NOTICE.

Notice is hereby given you, R. F. Keppel & Brother, Inc., respondent herein, that the sixth day of June, A. D. 1930, at two o'clock in the afternoon, is hereby fixed as the time and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

> (1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respond-

ent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents what the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear or to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its secretary, and its official seal to be hereto affixed, at Washington, D. C., this second day of May, A. D. 1930.

By THE COMMISSION,

OTIS B. JOHNSON,
Secretary.

(Seal)

ANSWER.

(Filed June 6, 1930.)

Now comes R. F. Keppel & Brother, Inc., a corporation organized and doing business under the laws of the State of Pennsylvania, and in answer to the complaint heretofore filed in this cause states:

Paragraph One: Respondent admits the allegations contained in paragraph one of the complaint.

Paragraph Two: Respondent admits that it sells candies to wholesalers and jobbers substantially in the manner alleged in paragraph two, and that it adopted said plan in order to meet competition. Respondent denies that the consumer obtains respondent's products or other article accompanying the same, wholly by lot or chance.

Further answering said paragraph two, respondent states it has at all times sold all of its products outright and exclusively to wholesalers and jobbers, and that respondent has never exercised any authority or attempted to exercise any authority in respect of the manner of sale or other disposition of respondent's products over the wholesalers and/or jobbers to whom respondent sold its products or over any others.

Of the averments in said paragraph two not herein admitted or denied, this respondent is without knowledge.

Paragraph Three: Answering paragraph three of the complaint, this respondent is without knowledge in respect of the manner and place of resale of respondent's products by the wholesalers and jobbers to whom they are sold by respondent. Respondent denies that

it supplies and/or places in the hands of others the means of conducting a lottery or lotteries.

Paragraph Four: Respondent denies each and all of the allegations contained in paragraph four of the complaint.

Paragraph Five: Respondent denies each and all of the allegations contained in paragraph five of the complaint.

R. F. KEPPEL & BROTHER, INC.,
a Corporation,

By JOHN A. COYLE,
Lancaster, Pa., and
MOHUN & ELLIOTT,
Washington, D. C.,
Attorneys for R. F. Keppel & Brother, Inc., a Corporation.

June 6, 1930.

ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the twenty-second day of September, A. D. 1930.

Commissioners:

GARLAND S. FERGUSON, JR., *Chairman,*
C. W. HUNT,
WILLIAM E. HUMPHREY,
CHARLES H. MARCH,
EDGAR A. MCCULLOCH.

DOCKET No. 1816.

In the Matter of

R. F. Keppel & Brother, Inc.,

This matter being at issue and ready for the taking of testimony,

IT IS ORDERED that E. C. Alvord, an examiner of this Commission, be and he is hereby designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

IT IS FURTHER ORDERED that the taking of testimony in this proceeding begin on Tuesday, September 30, 1930, at 10 A. M., at Room 2212, 1800 Virginia Avenue, N. W., Washington, D. C.

Upon completion of testimony for the Federal Trade Commission, the Examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The Examiner will then close the case and make his report.

By the Commission:

OTIS B. JOHNSON,
(Seal) *Secretary.*

FINDINGS AS TO THE FACTS AND CONCLUSION.

UNITED STATES OF AMERICA.
BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the twenty-eighth day of September, A. D. 1931.

Commissioners:

C. W. HUNT, *Chairman*,
WILLIAM E. HUMPHREY,
CHARLES H. MARCH,
EDGAR A. MCCULLOCH,
GARLAND S. FERGUSON, JR.

DOCKET NO. 1816.

In the Matter of

R. F. Keppel & Brother, Inc.

Pursuant to the provisions of an Act of Congress, approved September 26, 1914 (38 Stat. 719), the Federal Trade Commission issued and served a complaint upon the respondent, R. F. Keppel & Brother, Inc., charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act.

The respondent having entered its appearance herein and filed its answer to said complaint, hearings were had and evidence was thereupon introduced before

an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for final hearing on the briefs of counsel for the Commission and respondent, and the Commission having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusions drawn therefrom.

FINDINGS AS TO THE FACTS.

Paragraph One: Respondent, R. F. Keppel & Brother, Inc., is a corporation organized under the laws of the State of Pennsylvania, having its office and place of business in the City of Lancaster, State of Pennsylvania. Respondent is now, and for more than five years last past has been, engaged in the manufacture of candy in said city and state, and in the sale and distribution of said candy to wholesalers, jobbers and retailers in the State of Pennsylvania and other States of the United States. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Pennsylvania to purchasers thereof in States of the United States other than the State of Pennsylvania. In so carrying on said business respondent is and has been engaged in interstate commerce, and is and has been in active competition with other corporations, firms and partnerships also engaged in the manufacture of candy, and in the sale and distribution of the same in interstate commerce.

Paragraph Two: Among the candies manufactured and sold by respondent is an assortment packed 120 pieces to each package labeled, "Chocolate Penny Men," Commission's Exhibit 1. Each of the 120 pieces in each of said packages is a chocolate-covered cream

candy moulded into the shape of a man and retailing for one cent each. Among these 120 pieces there are four pieces in which one penny is concealed. In each of said packages as sold by the respondent to the wholesaler, jobber and retailer is placed a card displaying a picture of a school-boy, and bearing the label, "Watch This Boy, He Has Money in His Pockets," Commission's Exhibit 2. The purchaser who procures one of said pieces of chocolate cream candy which contains a penny receives his money back, and in fact receives the piece of candy free of charge, and the purchaser who procures one of the 116 pieces of chocolate cream candy which do not contain any money, pays one cent for the said piece of candy.

The said pieces of candy in said packages are so manufactured as to make it impossible for the purchaser to ascertain in which piece of candy the coins are placed until after selection has been made and the piece broken. Thus, whether the purchaser pays for the piece of candy, or whether he receives it free of charge, is determined wholly by lot or chance.

Paragraph Three: Another package of candy manufactured and sold by the respondent contains peanut bars and is labeled "1, 2, 3, Big Chief 60s," Commission's Exhibit 4. This candy is packed in boxes containing sixty pieces each, ten of which retail at one cent each, ten at two cents each and forty at three cents each. Each piece of said candy is uniform in size and quality, and is wrapped in non-transparent paper on which is printed the words "Chocolate covered peanut chew," Commission's Exhibit 6. Enclosed within the wrapper of each piece of said candy is a ticket or card showing the retail price of that particular bar of candy, viz, one, two or three cents, Commission's Exhibit 6. Said candies are so packed and wrapped by respondent that when displayed it is impossible

for the purchasing public to ascertain the price of the several bars of said candy prior to making a purchase or selection and removing the wrapper. Purchasers of said peanut bars pay the price which is printed on the ticket or card enclosed within the wrapper of the peanut bars, and some purchasers pay one cent, some pay two cents and some pay three cents for identical pieces of candy. Thus, the price which the purchaser pays for a bar of candy is determined wholly by lot or chance. In each of said packages as sold by the respondent is placed a display card bearing the legends, "ten bars at one cent each, ten bars at two cents each, forty bars three cents each," Commission's Exhibit 5. On the bottom margin of said display card is a direction to the retail dealer to "Display this sales getter in end of box and watch this quality candy go."

Paragraph Four: Prior to the manufacture and distribution of the "1, 2, 3 Big Chief 60s" referred to in Paragraph Three above, the respondent manufactured and distributed a similar package containing forty bars of candy contained within similar wrappers, and containing a display card bearing the legend, "three Big Chief bars free, five bars at one cent each, five bars at three cents each, five bars at four cents each, and twenty-two bars at five cents each," Commission's Exhibit 7. Within the wrapper of each of said bars was a ticket showing whether the retail customer obtained the particular bar free, or at a price of one cent, or at a price of three cents, or at a price of four cents, or at a price of five cents. As packed by the respondent each piece of candy was uniform in size and quality, and the consuming public was unable to ascertain the price of a particular bar of said candy prior to making a selection and rembving the wrapper. Purchasers of said bars of candy paid the price which was printed on the ticket or card enclosed within the wrapper of the

bars of candy, and three purchasers received the bar of candy free, five paid one cent, five paid three cents, five paid four cents, and twenty-two paid five cents, for identical pieces of candy. Thus, the price which the purchaser paid for a bar of candy, or whether he received it free of charge, was determined wholly by lot or chance. Respondent has discontinued the sale of this particular assortment of candy.

Paragraph Five: Another package of candy manufactured and distributed by respondent is labeled "School Days 200," Commission's Exhibit 8. This package contains 200 small chocolate cream candies, and also contains eight chocolate-covered pieces of candy moulded into the shape of a boy, eight chocolate-covered pieces of candy moulded into the shape of a girl, and four double pieces of chocolate-covered candy called "twins." The package also contains a "School Companion," that is, a container in which are placed five lead pencils, a pen and penholder, a six-inch ruler, and two erasers. In each of said packages the respondent places a display card bearing the legends, "one piece of cream with white center, one cent; one piece of cream with pink center and school boy or girl, one cent; one piece of cream with chocolate center and set of twins, one cent; the last piece of cream and School Companion one cent," Commission's Exhibit 9. The 200 chocolate cream candies contained in said package are uniform in size and shape, sixteen of the said chocolate cream candies having pink centers, four of the said chocolate cream candies having chocolate centers, and the remaining 180 pieces of chocolate cream candies having white centers. The purchaser who procures a piece of chocolate cream candy which has a pink center, receives in addition to the piece of candy, one of the chocolate boys or girls; if he procures a piece of chocolate candy having a chocolate center, he receives in

addition to the piece of candy, one of the chocolate "twins"; if he purchases the last piece of chocolate cream candy, he receives in addition to the piece of candy, the "School Companion"; if he procures one of the 180 pieces of chocolate cream candy having white centers, or does not purchase the last piece of chocolate cream candy, he receives only the piece of chocolate cream candy for his penny, without any additional prize or premium.

The said chocolate cream candies contained in said package are so manufactured by the respondent as to effectually conceal from the public the color of the center of the several chocolate cream candies until after the purchaser has made a selection and broken the particular piece selected. Thus, whether the purchaser receives a prize or premium of a larger piece of candy, or an article of merchandise, in addition to the piece of candy which he purchases, is determined wholly by lot or chance.

Paragraph Six: The lottery or prize packages described in paragraphs 2, 3 4 and 5 above, are generally referred to in the candy trade or industry as "Break and Take" packages. The packages or assortments of candy without the gaming, prize or lottery features in connection with their resale to the public are generally referred to in the candy trade or industry as "Straight Goods." These terms will be used hereafter in these findings to describe these respective types of candy.

Paragraph Seven: Numerous retail dealers purchase the packages described in paragraphs 2, 3, 4 and 5 above either from respondent or from wholesale dealers or jobbers who in turn have purchased said packages from respondent, and such retail dealers display said packages for sale to the public as packed by the

respondent, and with the display card furnished by the respondent, and the candy contained in said packages is sold and distributed to the consuming public in the manner suggested by respondent.

Paragraph Eight: All sales made by respondent, whether to wholesalers and jobbers, or to retail dealers, are absolute sales, and respondent retains no control in any manner over the goods after they are delivered to the wholesale dealer or jobber, or retail dealer. The packages are assembled and packed in such manner that they can be displayed by the retail dealer for sale and distribution to the purchasing public as suggested by the display card enclosed in each package without alteration or rearrangement. An examination of the packages or assortments of candy described in paragraphs 2, 3, 4 and 5, herein, as packed, assembled, and sold by respondent shows that said packages or assortments can not be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble or rearrange the said packages or assortments.

In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers, and to retail dealers direct, of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, 4 and 5 herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs and assembles such candy in the way and manner described, so that it may and shall be resold to the public by lot or chance by said retail dealers.

Paragraph Nine: The sale and distribution of candy by the retailers by the methods described in the findings as to the facts herein, is a sale and distribution of candy by lot or chance, and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several states. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers finding that they can dispose of more candy by the "Break and Take" method, buy from respondent, and others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "Straight Goods" candy show a continued decrease.

The sale and distribution of candy by lot or chance provides an easy means of disposing of such products. There is a constant and growing demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

Paragraph Ten: The principal demand in the trade for the "Break and Take" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools, and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gaming feature connected with the "Break and Take" package, and the possibility of winning a prize or premium, it has been observed that the children purchase them in preference to the "Straight Goods" candy when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. It has been found that in many instances children purchase a piece of candy, break it open, and if the center is not of a prize-winning color, throw it away and purchase other pieces of candy until a prize is obtained or their money gone; in other instances that children who win a prize or premium give it away to other children, and continue to purchase pieces of candy. The sale and distribution of "Break and Take" packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or premium by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

Paragraph Eleven: There are in the United States a large number of manufacturers of candy, who are manufacturing and selling "Break and Take" candy. The lottery or prize package product of each of these manufacturers is of the same general character as that

produced by the respondent, and all of these lottery or prize packages are in direct competition with "Straight Goods" of the same general character; that is, the "Break and Take" goods usually appear in the form sold at retail at one cent each, or in the form of bar goods sold at three cents or five cents each, and these "Break and Take" goods are sold in direct competition with "straight" penny goods and five-cent bars.

The pieces of candy in the "Break and Take" packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of "Straight Goods" candy, or the quality of the candy in the "Break and Take" packages is poorer than that in the "Straight Goods" assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes or premiums which are distributed with the "Break and Take" goods.

Paragraph Twelve: Respondent manufactures and sells a chocolate cream candy with which no gaming, prize, or lottery feature is connected. This candy is packed 120 pieces to the box, and retails at one cent per piece, as does the chocolate cream candy described in paragraph five above. Each individual piece of this "Straight Goods" penny candy manufactured and sold by respondent is larger than those in the prize or lottery packages, but the quality of the candy in the two packages is the same. The pieces of candy in the "Break and Take" packages are made smaller than those in the "Straight Goods" packages in order to compensate the manufacturer for the value and weight of the prizes or premiums which are distributed with the "Break and Take" packages. The purchaser of a piece of candy from a "Break and Take" package does

not receive the same value for his money that he would if he purchased a piece of candy from a "Straight Goods" package, unless he received with the latter purchase one of the prizes or premiums, in addition to the piece of candy purchased. In the latter event he receives a value greatly in excess of the value he would receive if he purchased a piece of "Straight Goods" candy.

Paragraph Thirteen: There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages or assortments of candy, and who sell their "Straight Goods" candy in interstate commerce in competition with the "Break and Take" packages or assortments of respondent and other manufacturers of similar candy. The sale of candy without a lottery or gaming feature in connection therewith is adversely affected by the sale of "Break and Take" candy, and manufacturers of the former type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in sales of "Straight Goods" candy is principally due to the gambling or lottery feature connected with the "Break and Take" candy.

The purchasers and consumers of these two types of candy are principally children, and the children almost without exception purchase the candy which offers a chance to win a prize or premium rather than candy which does not have a lottery or gaming feature in connection with its sale, irrespective of the difference in size of the pieces, or the difference in quality of the two types of candy.

Paragraph Fourteen: Respondent manufactured and sold "Break and Take" packages or assortments

of candy prior to the year 1925. In that year respondent discontinued the sale of this type of candy, and manufactured and sold only "Straight Goods" for a time. During this period its business showed a decided decreased in volume and profits, and it resumed the sale of "Break and Take" packages or assortments. Since its resumption of the manufacture and sale of this type of candy the sales of respondent have shown a continuously increased volume, each year, and at the present time 60 per cent. of the sales of respondent consist of candy with a lottery or gaming feature in connection therewith. During the time respondent was not manufacturing and selling "Break and Take" candy, many of its competitors were continuing the sale of that type of candy, and in order to meet the competition of those manufacturers, and to make a profit in its business, respondent considered it necessary to resume the manufacture and sale of "Break and Take" candy.

Paragraph Fifteen: Respondent manufactures candy which it sells to wholesalers, jobbers and retailers without any prizes or premiums, and without any lottery or gaming feature. In addition to said business, respondent conducts a jobbing department through which it distributes to retail dealers, in interstate commerce, the products of other candy manufacturers. The entire manufacturing business of the respondent for the year ending June 30, 1930, amounted to approximately $391,000.

Paragraph Sixteen: The sale and distribution of candy by lot or chance is against the public policy of many of the several States of the United States, and some of said States have laws making lotteries and gaming devices penal offenses.

CONCLUSION.

The aforesaid acts and practices of respondent, R. F. Keppel & Brother, Inc., under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce, and constitute a violation of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission.

C. W. HUNT,
Chairman.

(Seal)

Dated this twenty-eighth day of September, A. D. 1931.

Attest:

OTIS B. JOHNSON,
Secretary.

ORDER TO CEASE AND DESIST.

UNITED STATES OF AMERICA,
BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the twenty-eighth day of September, A. D. 1931.

Commissioners:

C. W. HUNT, *Chairman*,
WILLIAM E. HUMPHREY,
CHARLES H. MARCH,
EDGAR A. MCCULLOCH,
GARLAND S. FERGUSON, JR.

DOCKET No. 1816.

In the Matter of

R. F. Keppel & Brother, Inc.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and the testimony taken and briefs filed herein, and the Commission having made its findings as to the facts and conclusion that the respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes."

IT IS NOW ORDERED that the respondent, R. F. Keppel & Brother, Inc., its officers, agents, representatives and employees, in the manufacture, sale and distribution in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, or retail dealers, packages or assortments of candy, which are used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(3) Selling and distributing pieces of candy containing coins or pieces of money, which said pieces of candy are packed and assembled in packages or assortments with other pieces of candy of similar size, shape and quality not containing coins or pieces of money, for resale to the public by retail dealers.

(4) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape and quality containing within their wrappers tickets bearing different prices, or bearing the word "free," or phrases containing said word.

(5) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of chocolate-covered candy of uniform size,

shape and quality, having centers of different color, together with larger pieces of candy, or articles of merchandise, which said larger pieces of candy, or articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(6) Furnishing to wholesale dealers, jobbers and retail dealers, display cards, either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchaser that the candy or candy products are being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(7) Furnishing to wholesale dealers, jobbers and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products, which said advertising literature informs the purchasers and purchasing public:

(a) That certain pieces of candy in a package or assortment contain coins or pieces of money which are given as prizes to the purchaser of the particular piece of candy.

(b) That certain bars of candy of uniform size, weight and quality may be obtained, free of charge, or for a price of one cent, two cents, three cents, four cents or five cents, depending upon the price tag enclosed in the wrapper of the piece of candy selected by the purchaser.

(c) That upon the obtaining by the ultimate purchaser of a piece of candy with a particular colored center, that a larger piece of candy, or other article of merchandise, will be given free to said purchaser.

(d) That upon purchasing the last piece of candy in the package or assortment, a larger piece of candy, or an article of merchandise will be given as a prize.

IT IS FURTHER ORDERED that the respondent, above-named, within sixty (60) days after the service upon it of this order, shall file with the Commission a report in writing setting forth in detail the manner in which this order has been complied with and conformed to.

By the Commission.

OTIS B. JOHNSON,
Secretary.

(Seal)

OFFICIAL REPORT OF PROCEEDINGS.

BEFORE THE FEDERAL TRADE COMMISSION.

DOCKET No. 1816.

In the Matter of

R. F. Keppel & Brother, Inc.

Tuesday, September 30, 1930,
Room 1001, Federal Trade Commission Office, Washington, D. C.

Met pursuant to notice, 10 o'clock A. M.

Before: ELIAS C. ALVORD, Examiner.

Appearances:

HENRY C. LANK and G. ED. ROWLAND, for the Federal Trade Commission.

BARRY MOHUN (Shoreham Bldg., Washington, D. C.), appearing on behalf of the respondent.

EXAMINER ALVORD: Gentlemen, we are ready to proceed in the matter of R. F. Keppel & Brother, Incorporated, Docket No. 1816. Are you ready?

MR. LANK: Yes, Mr. Examiner, we are ready to proceed.

MR. MOHUN: We are ready, Mr. Examiner.

EXAMINER ALVORD: Are there any motions that you desire to make at this time, gentlemen?

MR. MOHUN: No, sir.

EXAMINER ALVORD: Then call your first witness.

MR. LANK: I have got an offer I want to make before I call my first witness. If the Examiner please, I have here excerpts from the State Constitutions of each State in the United States, and including Alaska, and also excerpts from the Federal Statutes. These excerpts deal with the question of lotteries.

I have furnished respondent's attorney with a copy of this pamphlet, and I would like to offer it for the record just to show the statutes in force throughout the various States and in the United States.

EXAMINER ALVORD: Is there any objection?

MR. MOHUN: Yes, sir. I object first because it is incompetent, and hence irrelevant; and, secondly, because it is as shown by the typewritten note on page 1, incomplete; thirdly, because it is not prepared in the manner required to prove the statutes or constitutional provisions of any state.

EXAMINER ALVORD: The objection is sustained.

MR. LANK: And I may have an exception. And we also reserve the right to make the offer at a later stage of the proceedings, if we may. I will ask Mr. Rouf to be sworn and to take the witness stand.

L. A. ROUF, was thereupon called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. You are Mr. Leo A. Rouf?

A. Yes, sir.

Q. And you are the treasurer and vice-president of the R. F. Keppel & Brother, Incorporated?

A. Yes, sir.

Q. That is the respondent in this case?

A. Yes, sir.

Q. How long have you had such position, Mr. Rouf?

A. I have had that position since, I would say, about 1924.

Q. And prior to that?

A. Prior to that secretary from 1915.

Q. How long have you been engaged in the candy business?

A. Since 1909.

Q. The R. F. Keppel & Brother, Incorporated, is located in Lancaster, Pennsylvania?

A. Yes, sir.

Q. They are a corporation?

A. They are.

Q. Organized under the laws of Pennsylvania?

A. Yes, sir.

Q. They are engaged in the manufacture of candies?

A. Yes, sir.

Q. How long have they been so engaged?

A. They have been manufacturing since 1918. Prior to that they were a jobbing and wholesale establishment.

Q. And you were connected with them when they were a jobber?

A. Yes, sir; I say that with reservations. We had about two men that used to make a few items, just a few numbers for our own use, and we never sold it to jobbers up until 1918.

Q. The R. F. Keppel & Brother, Incorporated, sells this candy in various states of the United States, does it not?

A. Yes, sir.

Q. Shipping it from Pennsylvania to other states?

A. Other states; yes, sir.

Q. What is your method of selling your products, Mr. Rouf?

A. By salesmen and by circular.

Q. Those salesmen cover the jobbing trade exclusively?

A. Yes, sir.

Q. They sell to retailers, do they?

A. We have different sets of salesmen, a set of salesmen for the jobbing department, and a different set of salesmen for the factory who sell jobbers.

Q. Do you also have salesmen who sell to retailers?

A. Yes. That is the jobbing department.

Q. I see. You have a jobbing department in your own organization?

A. Yes; that is, they travel within a thirty-mile radius of Lancaster.

(Discussion off the record, after which the following occurred):

By Mr. Lank:

Q. Both of those lines that you pursue, that is, the jobbing trade, and the selling to the retail consumers, are both interstate and intrastate, are they not?

A. We do a little business in Cecil County, Maryland, the upper tier, right up along Pennsylvania, and that is the only time the jobbing department gets out of the state.

Q. And then you sell to other jobbers throughout the various states?

A. That is it.

Q. And you sell to retailers in Pennsylvania and to a few retailers in Maryland?

A. That is it exactly.

Q. What types of candies or kinds of candies does your concern deal in, Mr. Rouf?

A. Well, various assortments of candies. We make hard candies, we make these chocolate breaks. They call them breaks. We make pail candies. We make penny novelties, penny candies, I guess you should term that. Does that cover it?

Q. I think that covers what I wanted there. Did you bring some packages of candy with you as requested, Mr. Rouf?

A. Yes, sir; I did.

Q. May I have them?

A. Yes, sir (producing boxes of candy). You requested five types. Two we are not manufacturing at the present time.

Q. This one package you have handed me here is labeled on the end "Chocolate Penny Man, 120's"?

A. Yes, sir.

MR. LANK: May that be marked for identification?

EXAMINER ALVORD: Let it be so marked.

(The box referred to was thereupon marked "Commission's Exhibit No. 1 for identification.")

MR. LANK: I offer that in evidence, if the Examiner pleases, as Commission's Exhibit No. 1.

EXAMINER ALVORD: It will be received.

(The box referred to was thereupon received in evidence and marked "Commission's Exhibit No. 1.")

By MR. LANK:

Q. Mr. Rouf, that package when you handed it to me was complete, was it not?

A. Absolutely.

Q. And was in the condition that it would be sent out by your concern?

A. Yes, sir.

Q. And will you explain to us what the package does contain?

A. The package contains 120 pieces of cream candy shaped like men, and four of them containing pennies, wrapped in waxed paper.

Q. Four of the 120 pieces contain pennies?

A. Four of the 120 pieces contain pennies.

Q. Do you know what pieces of the 120 contain the pennies?

A. No, sir; I do not know.

Q. That package is sold by you to the wholesale dealer and to a few retail dealers?

A. Yes, sir.

Q. In its present shape?

A. In the present shape.

Q. Now in the package in addition to the 120 chocolate pieces, is there a card which I am showing you?

A. Yes, sir.

MR. LANK: I offer that card as a separate exhibit, if the Examiner please, as Commission's Exhibit No. 2.

EXAMINER ALVORD: It will be received.

(The paper referred to was thereupon received in evidence and marked "Commission's Exhibit No. 2.")

By MR. LANK:

Q. Does the blank space at the bottom have any special significance, Mr. Rouf?

A. No, sir; it does not. The only reason for the blank space is that there is no necessity for any printing.

Q. And it is to enable the card to be put in the end of the box and still leave the instructions or designations, or whatever it may be, exposed to view?

A. Yes, sir.

Q. I also hand you another little ticket that is in the box and ask you what that is?

A. That is self-evident.

MR. LANK: I offer that ticket as Commission's Exhibit No. 3.

EXAMINER ALVORD: It will be received.

(The paper referred to was thereupon received in evidence and marked "Commission's Exhibit No. 3.")

By MR. LANK:

Q. Commission's Exhibits Nos. 2 and 3 are found in the package which is already marked Commission's Exhibit No. 1, and those exhibits do not necessarily relate to any other package of candy, do they?

A. No more than the packing slip relates to any package.

Q. The packing slip is Exhibit No. 3?

A. Yes, sir.

Q. Mr. Rouf, I think you said that you did not know which four pieces contained the pennies?

A. That is right.

Q. Is there any way that the general public are able to ascertain which piece contains a penny from a cursory examination of the package, or when they come into a retail store to purchase?

A. The public? No.

Q. Is it the purpose of the respondent to so manufacture those pieces that the public cannot ascertain which piece has the penny in it?

A. Yes, sir.

Q. How long has the respondent been manufacturing this particular package, Mr. Rouf?

A. Well, that would only be a guess on my part; I couldn't tell you.

Q. But it has been manufacturing it for an appreciable length of time, has it not?

A. It has been manufacturing it for several years.

Q. Several years?

A. But since when I couldn't tell you.

Q. I also show you another package, Mr. Rouf, marked "123, Big Chief 60's," and ask you if that package is one of the packages you furnished me this morning?

A. Yes, sir.

Q. And when furnished me the package was complete in the shape that it is sent out to the trade?

A. Yes, sir.

MR. LANK: I offer that package as Commission's Exhibit No. 4.

EXAMINER ALVORD: It will be received.

(The package referred to was thereupon received in evidence and marked "Commission's Exhibit No. 4.")

By MR. LANK:

Q. Will you tell us what the package contains, Mr. Rouf?

A. It is on the card. It is no trouble to tell at all.

MR. LANK: The card I will offer in evidence now as Exhibit No. 5.

EXAMINER ALVORD: On this card appears the number of packages of Big Chief Peanut Chew contained in the package; is that right?

THE WITNESS: Yes, sir.

EXAMINER ALVORD: It will be received.

(The card referred to was thereupon received in evidence and marked "Commission's Exhibit No. 5.")

By MR. LANK:

Q. The card indicates that the package contains sixty bars of candy; is that correct, Mr. Rouf?

A. Yes, sir.

Q. Ten of those bars, according to the card which is Exhibit No. 5, sell at one cent each?

A. Yes, sir.

Q. And ten bars at two cents each?

A. Yes, sir.

Q. And forty bars at three cents each?

A. Yes, sir.

Q. Will you explain that, please, Mr. Rouf?

MR. MOHUN: I object to that question, if the Examiner please, on the ground that the witness has not testified that he sold any of these candies at the prices included in the question of Mr. Lank. Mr. Lank framed his question from a printed card, but this witness obviously has no knowledge as to what somebody else does with the package.

MR. LANK: He certainly has.

MR. MOHUN: You must first show that he has knowledge if you ask him what they sell for. I do not know personally whether he has knowledge or not.

MR. LANK: Does the Examiner want to hear me on that?

EXAMINER ALVORD: No. The objection is overruled. The witness may answer, if he knows.

A. I do not know how you want me to answer it.

By MR. LANK:

Q. Do you recall the question now?

A. I do not know how you want me to answer it. We indicate on the card——

Q. (Interposing.) Do you think the card itself is explanatory?

A. I would think so.

Q. The pieces of candy in Exhibit 4 are each wrapped in a piece of paper, are they not, Mr. Rouf?

A. Yes, sir.

Q. And have the same appearance when looked at in the box?

A. Yes, sir.

Q. They are the same size, and they have the same kind of wrapper around each piece?

A. Yes, sir.

Q. Do some of these bars have a card inside of the outer wrapper?

A. Yes, sir.

Q. And do those cards have different markings on them, Mr. Rouf?

A. Yes, sir.

Q. Do you know what those markings are?

A. The same as indicated on the card.

Q. That is that within the wrapper of ten of the bars there is a ticket that says one cent?

A. Yes, sir.

Q. And within the wrappers of another ten of the bars is a ticket which says two cents?

A. Yes, sir.

Q. The remaining forty bars sell for three cents each without having any tickets in the wrapper?

A. Tickets in all.

MR. MOHUN: I beg your pardon. I did not hear the answer.

THE WITNESS: The tickets are in all.

By MR. MOHUN:

Q. Oh! Tickets in all?

A. There should be.

By MR. LANK:

Q. I thought I counted one without one. Maybe I did not. We have got the one, two and three. I have

removed the wrappers from three of these bars of candy, Mr. Rouf, and find tickets marked one cent, two cents, and three cents.

A. Yes, sir.

MR. LANK: I may at another time after this hearing paste these on a slip of paper, and then, if I may, offer them in evidence. Possibly they had better be identified now so that they can go in in the proper order.

MR. MOHUN: I have not the slightest objection to that. The witness has testified, I think, that each piece of candy of the sixty in the box—correct me if I am wrong—contains a price, or contains a slip showing the price in accordance with the indications on Commission's Exhibit No. 5. Of course, it is not necessary to open each one.

MR. LANK: No.

MR. MOHUN: Everybody will concede that that is correct?

MR. LANK: I will withdraw that offer, then.

EXAMINER ALVORD: Wait a minute. I do not know but what it ought to go in.

MR. LANK: These three tickets, together with one of the labels, have been attached to a sheet of paper which I now offer as Commission's Exhibit No. 6.

EXAMINER ALVORD: They will be received.

(The papers referred to were thereupon received in evidence, and marked "Commission's Exhibit No. 6.")

By MR. LANK:

Q. Mr. Rouf, I hand you now another card and ask you if at one time you manufactured a package that answered the description of that card.

A. Yes, sir.

MR. LANK: I think I will offer that as Commission's Exhibit No. 7. I offer this last-mentioned card as Commission's Exhibit No. 7.

EXAMINER ALVORD: It will be received.

(The card referred to was thereupon received in evidence and marked "Commission's Exhibit No. 7.")

By MR. LANK:

Q. Both of these cards, Mr. Rouf, refer to the Big Chief Peanut Chews?

A. Yes, sir.

Q. And how long have you been manufacturing the package which you furnished here this morning, which is Commission's Exhibit No. 4?

A. About a year and a half.

Q. And prior to that time did you manufacture a package which would meet the description of the card marked Commission's Exhibit No. 7?

A. Yes, sir.

Q. And for how long did you manufacture that package, approximately?

A. I would say approximately two years and a half ago we started it.

Q. The package, Commission's Exhibit No. 4, when it was handed to us this morning, was in the shape that you sent it out, I understood?

A. Yes, sir.

Q. Is that package sold to wholesale dealers throughout the United States?

A. Yes, sir.

Q. And to some retail dealers in Pennsylvania and Maryland?

A. Yes, sir; I don't know about Maryland. There are just three or four accounts we sell, and whether

they buy any of that type of merchandise I would not be able to tell you offhand.

Q. But you offer it for sale, however?

A. We offer it for sale.

Q. Is there any way the public can ascertain which piece of candy contains the ticket marked one cent, or which bar of candy contains the ticket marked two cents, or which bar of candy contains the ticket marked three cents without removing the wrapper?

A. No.

Q. The description on the card marked Commission's Exhibit No. 7 says, "This box contains three Big Chief Bars free, five bars at one cent each, five bars at three cents each, five bars at four cents each, twenty-two bars at five cents each." Were those pieces of candy, Mr. Rouf, wrapped in the same manner that the pieces we have before us were?

A. Yes, sir.

Q. And inside of the wrapper was a ticket or card that told whether the bar was free, or whether sold at one cent, three cents, four cents or five cents?

A. Yes, sir.

Q. Was there any way for the public or for anyone looking at the box to ascertain which bar of candy was free?

A. No, sir.

Q. Without removing the wrapper?

A. No, sir.

Q. And I presume that applies also to the one-cent tickets, the three-cent ticket, the four-cent ticket, and the five-cent ticket?

A. Yes, sir.

Q. On each of these cards, that is Commission's Exhibit No. 5, and Commission's Exhibit No. 7, at the bottom, we find: "Mr. Dealer: Display this sales-getter in end of box and watch this quality candy go."

Does that statement in your estimation need any explanation, Mr. Rouf?

A. No, sir.

Q. And if I presume that that is instructions to the retail dealer my presumption is correct, is it?

A. Yes, sir.

Mr. Mohun: I take exception to that question. The witness has not testified there were any instructions to the retail dealer, and he has not testified there were any relations between the retail dealer and this respondent other than that of a purchaser. It has not been shown by the slightest evidence that this respondent was in a position to instruct, and underscore that word, any retail dealer. I shall show on cross-examination, unless it is shown on direct, that it was an out and out sale with no restrictions of any kind or character, hence your question is clearly objectionable because it presumes a fact that does not exist.

Mr. Rowland: It presumes a fact that is self-evident on the exhibit.

Examiner Alvord: Just a moment, please. The objection is overruled.

Mr. Mohun: An exception is noted, please.

Mr. Lank: Did the reporter get the answer?

The Reporter: The answer was, "Yes, sir."

Examiner Alvord: I would like to ask the witness a question.

Mr. Lank: Oh, yes, sir; pardon me.

Examiner Alvord: On Commission's Exhibit 7 I notice that there is printed "Five bars of one cent each," and "Five bars of three cents each, five bars of four cents each," and "Twenty-two bars at five cents each." Do those various sums

of money refer to the price at which the bars are sold?

Mr. Mohun: Just a minute, please, so that the witness does not answer the question. Judge, there is no evidence in this record that this respondent, or that this witness has any knowledge at which the prices are to be made, or has any knowledge of the prices at which the goods are sold. I submit that the card speaks for itself.

Examiner Alvord: Perhaps I ought to change that. Do those various sums represent the prices at which the various bars in the box are intended to be sold?

Mr. Mohun: Are intended to be sold? Whose intention?

Examiner Alvord: By the dealer; by the dealer.

Mr. Lank: You mean the retailer?

Examiner Alvord: Yes.

Mr. Mohun: The same objection, your Honor. The dealer or retailer could throw them away, or sell them in any manner he saw fit.

(Discussion off the record, after which the following occurred):

Mr. Mohun: I think it speaks for itself.

Mr. Rowland: May I ask a question?

Examiner Alvord: Yes.

By Mr. Rowland:

Q. What is the purpose, Mr. Rouf, of putting or packing in the box that card marked as Commission's Exhibit 5, or Commission's Exhibit 7?

A. A suggestion.

Q. A suggestion to whom?

A. A suggestion to the retailer.

Q. The retail dealer?

A. Yes, sir.

Q. When the package is received by the wholesaler, or to whom you sell, the jobber, he ordinarily, so far as you know, does not open it, does he? I mean, in the ordinary course of business he does not open it and make use of that card?

MR. MOHUN: The question is objectionable because it is asking for matters clearly outside the knowledge of the witness.

EXAMINER ALVORD: The objection is sustained. I think I will ask the witness to answer my question, if he will, and overrule the objection to it. Read the question to him, Mr. Reporter.

MR. MOHUN: Note an exception, please.

(The following question was thereupon read by the reporter:

"Perhaps I ought to change that. Do those various sums represent the prices at which the various bars in the box are intended to be sold?")

THE WITNESS: It is a suggestion. That is all I can say to you.

EXAMINER ALVORD: Well, that is the suggested retail price for each bar?

THE WITNESS: A suggestion of what to do with the box, I would say.

EXAMINER ALVORD: What I do not understand is that if this is the suggested resale price of these bars how does the dealer know which bars to sell for 5 cents, 4 cents, which for 3 cents, and which for 1 cent?

MR. MOHUN: You had better listen to that question, or have it read over to you.

THE WITNESS: How was that question?

EXAMINER ALVORD: If that is a suggested retail price how does the dealer determine which bars are to be sold for five, which for three, which for four, and which for one?

THE WITNESS: Well, I would say that that would be his problem, the same as any merchandise that he would purchase. He has got problems wherein he will buy merchandise and sell it under cost to get rid of it.

EXAMINER ALVORD: Then do I understand this, that there are five bars in there that contain one cent each?

THE WITNESS: Yes, sir.

EXAMINER ALVORD: And five bars that contain three cents each?

THE WITNESS: Yes, sir.

EXAMINER ALVORD: And five bars that contain four cents each?

THE WITNESS: Yes, sir.

EXAMINER ALVORD: And twenty-two bars that contain five cents each?

THE WITNESS: Yes, sir.

MR. LANK: May I just correct one thing, if the Examiner please? These bars do not contain the pennies. They contain tickets which bear that mark.

EXAMINER ALVORD: They receive that amount of money for each ticket if they elect to take it?

THE WITNESS: Yes, sir.

EXAMINER ALVORD: Then these prices mentioned on this card do not have anything to do with the retail price of each bar, have they?

THE WITNESS: None other than a suggestion.

EXAMINER ALVORD: Yes. It indicates to the dealer and to the buyer that the various sums of money mentioned there will be found in the bars of candy sold or contained in the box?

MR. ROWLAND: Not the sums of money to be found, but a card representing that sum of money.

EXAMINER ALVORD: Well, that is the same thing.

THE WITNESS: Yes.

MR. ROWLAND: In the other case we found money in the penny man.

By MR. LANK:

Q. Mr. Rouf, you say you have been in the candy business since 1909?

A. Yes, sir.

Q. And you suggest to the retail dealer that he put that card in the end of his package of candy when he displays it?

A. That is evident from the card.

MR. MOHUN: It has not been shown that he suggests it to the retail dealer.

MR. LANK: He testified that.

MR. MOHUN: He puts those in the packages. You say "Suggested to the retail dealer." That would imply that he is in touch with the retail dealer.

MR. LANK: He has so testified that he makes that suggestion to the retail dealer by the card.

By MR. LANK:

Q. And you say you have been in the candy business since 1909, Mr. Rouf?

A. Yes, sir.

Q. If that package is displayed on a retail dealer's counter with that card in it, with your knowledge of the candy business, if a purchaser walks in the store and picks up one of those bars of candy, takes the wrapper off, and finds there a ticket bearing the price one cent, do you, with your knowledge of the candy business, believe that the retail dealer could charge more than one cent for that bar of candy then?

MR. MOHUN: I object to the question. I do not know whether you are asking the witness a question or a guess.

EXAMINER ALVORD: The objection is sustained.

MR. LANK: All right. I will not insist on it now.

By MR. LANK:

Q. Do you know the price at which the Commission's Exhibit No. 4 is sold to the wholesale dealer or jobber by the respondent?

A. Sold to the wholesaler or jobber?

Q. By the respondent.

A. Let us see. I think it is seventy-five cents.

Q. And in your jobbing trade?

A. Let's see. You have got two exhibits here?

Q. Yes, sir.

A. You can total that yourself.

Q. Here is the one we have been dealing with, Exhibit No. 4; ten, twenty, one and fifty. At retail you would get——

A. Seventy-five cents.

Q. And in your jobbing department do you know at what price you sell that package to the retailer?

A. One dollar.

Q. Going back to Commission's Exhibit No. 1, do you know what price is charged by the respondent to the wholesaler or jobber for that package?

A. Sixty cents.

Q. And in your jobbing department.

A. Eighty cents.

Q. It sells to the retailer for eighty cents?

A. Eighty cents.

Q. We have here the third package which you handed to us this morning, Mr. Rouf, which bears the wrapper on the outside, "School Days, 200's." That package is one of the packages that the respondent puts up and distributes, is it not?

A. Yes, sir.

Q. And as the package was handed to me it was complete?

A. Yes, sir.

MR. LANK: May that package be marked as Commission's Exhibit No. 8?

EXAMINER ALVORD: Let it be received, and marked for identification.

(The package referred to was thereupon marked "Commission's Exhibit No. 8 for identification.")

MR. LANK: I offer it as Commission's Exhibit No. 8.

EXAMINER ALVORD: Let it be received.

(The package referred to was thereupon received in evidence, and marked "Commission's Exhibit No. 8.")

By MR. LANK:

Q. That package contains, does it not, Mr. Rouf, 200 chocolate creams?

A. Yes, sir.

Q. And eight chocolate-covered school boys, eight chocolate-covered pieces of candy in the shape of a boy or girl?

A. Yes, sir.

Q. And four pieces of candy in the shape of twins?

A. Yes.

Q. And it also contains a school companion, marked "Patrick Henry," a Patrick Henry school companion?

A. Yes, sir.

Q. And a card entitled "School Day Assortment"?

A. Yes, sir.

MR. LANK: That card I now offer as Commission's Exhibit No. 9.

EXAMINER ALVORD: Let it be received.

(The card referred to was thereupon received in evidence, and marked "Commission's Exhibit No. 9.")

By MR. LANK:

Q. The 200 chocolate pieces are of uniform size and shape, are they not, Mr. Rouf?

A. Yes.

Q. And do the majority of those chocolate pieces have white centers?

A. Yes, sir.

Q. And do eight of them have pink centers?

A. Yes.

Q. And four of them have a chocolate center?

A. Yes, sir.

Q. I will ask the purpose of the respondent in including Commission's Exhibit No. 9 in the package.

MR. MOHUN: I object to that question. I think the exhibit speaks for itself. It has not been shown that this witness has anything to do with the policy of the company that determines the purpose of putting in a certain exhibit.

EXAMINER ALVORD: The objection is overruled.

MR. MOHUN: An exception, please.

(The pending question was thereupon read by the reporter.)

A. A suggestion.

By MR. LANK:

Q. A suggestion to whom, Mr. Rouf?

A. A suggestion to the purchaser.

Q. It is a suggestion to the retail dealer when it is sold by your jobbing department, is that what you mean to say?

A. A suggestion to the purchaser, our purchaser.

Q. You are familiar with the practice of candy jobbers throughout the United States, aren't you, Mr. Rouf?

A. Just what do you mean by that? Familiar with them, or do I know of them?

Q. With their method of buying and selling candies. Doesn't the R. F. Keppel & Brother, Incorporated, maintain a jobbing department?

A. I am familiar with our own jobbing department.

Q. And for a number of years the R. F. Keppel & Brother, Incorporated, were in the jobbing business exclusively, were they not?

A. Yes, sir.

Q. And you are familiar with their method of doing business at that time, weren't you?

A. Yes, sir.

MR. MOHUN: Mr. Examiner, I am anxious, of course, to get the whole truth out here, but these questions are patently leading.

EXAMINER ALVORD: There is no question about their being leading.

MR. MOHUN: No.

By MR. LANK:

Q. Does or does not the jobber generally open a package of candy which he purchases for resale?

MR. MOHUN: Oh, now, I must object to that. The witness has no knowledge of what some man across the street does.

A. I don't know why he would. We simply sell him the merchandise. He opens it or doesn't open it. He shows a sample, and whether or not he shows the whole sample or submits one piece, I am not familiar with that. We in our jobbing department sell everything by samples.

EXAMINER ALVORD: The question is answered.

By MR. LANK:

Q. Mr. Rouf, one of the questions just previously answered by you, as I recall it, was that this card, Commission's Exhibit No. 9, was included in the package as a suggestion, and then you said, upon being pressed, that it was a suggestion to your purchaser. As a matter of fact, don't you know the real object of including that card in the package, and are you being frank when you say that it is a suggestion, or a suggestion to your purchaser?

MR. MOHUN: Is that the question?

MR. LANK: Yes.

MR. MOHUN: In the first place, he is attempting to impeach his own witness.

EXAMINER ALVORD: I beg your pardon? I did not hear you.

MR. MOHUN: In the first place, he is attempting to impeach his own witness. Mr. Rouf is called on behalf of the Commission. The question is obviously leading also.

EXAMINER ALVORD: Ordinarily your objection would be good, but in the everyday trial of these cases it is necessary to call adverse witnesses once in a while, and some latitude is necessarily indulged in in their examination. The objection is overruled.

MR. MOHUN: Will you allow me an exception, please?

EXAMINER ALVORD: Yes.

By MR. LANK:

Q. Will you now answer my last question, Mr. Rouf?

MR. MOHUN: Maybe you better read it to him. Read that last question.

(The pending question was thereupon read by the reporter.)

MR. MOHUN: I missed the verb in there. Read that last again.

(The pending question was thereupon read by the reporter.)

MR. MOHUN: I must renew my exception to that question. There is no point in restating the grounds. It is not shown that this witness has any knowledge of the object of the respondent in putting out printed matter.

EXAMINER ALVORD: The objection is overruled.

By MR. LANK:

Q. Will you answer the question, Mr. Rouf?

MR. MOHUN: Another exception, please. Answer the question if you can.

A. I don't know how I could answer it.

By Mr. Lank:

Q. If you cannot answer it that is all you have to say.

A. As I say, the card is a suggestion. If they follow it I can't stop them. If they don't follow it, I can't stop them. It is their merchandise after it is purchased.

Q. Who is that?

A. The people to whom we sell the merchandise, our customers.

Q. You say it is a suggested retail price to your customers?

A. It is a suggestion to them.

Q. To sell the candy at that price; is that your answer?

A. Yes, sir.

Q. Is it a suggestion to the wholesale dealer, or to the wholesale jobber, to sell those candies at one cent each?

A. The jobber does not retail candy.

Q. It is not a suggestion to the jobber, is it?

A. It is a suggestion to him, what he might do with it. The ultimate purchaser—I don't know how you want me to answer that; I don't know what you are getting at. If I was an attorney and could interpret your wordings all of the time, perhaps I could help you out all of the time.

Examiner Alvord: By the "ultimate purchaser" do you mean retailer?

The Witness: Retailer.

By Mr. Lank:

Q. Then do I understand your testimony to be that that is a suggestion to the retail dealer as a price at which he might sell the candy to the ultimate consumer?

A. I would say yes to that. I don't want to give you conflicting evidence here. I mean to give you what you want, but I don't know how to answer some of these questions.

Q. Is there any way to tell what color center the chocolate-covered pieces of candy of a uniform size and shape are without breaking into them?

A. Not that I know of.

Q. In other words, the color of the center is not exposed to the ultimate consumer until he breaks open the piece of candy?

A. No.

Q. At what price does this package sell by the respondent to the wholesaler or jobber?

A. One dollar.

Q. And at what price by your jobbing department to the retail dealer?

A. Our jobbing department?

Q. Yes.

A. One dollar and thirty-five cents.

Q. Are you familiar with the prices which are charged by other jobbing concerns?

A. They vary.

Q. Do you know within what range they vary on the sale of this package?

A. I couldn't tell you that. I have reasons to believe that they have been sold as high as $1.40, and as low as $1.10, depending upon the market.

Q. I hand you a piece of paper and ask you if you will tell me what it is, Mr. Rouf?

A. It is a circular of a new break that we put out.

Q. Put out by R. F. Keppel & Brother, Incorporated?

A. Put out by R. F. Keppel & Brother, Incorporated.

Q. By the respondent?

A. Yes, sir. Which is self-explanatory, the name being at the bottom of the paper.

MR. LANK: I offer that as Commission's Exhibit No. 10.

MR. MOHUN: Let me look at that again.

MR. LANK: All right.

MR. MOHUN: Where did you say it appeared?

MR. LANK: I did not say.

MR. MOHUN: I thought you said put out. Go ahead.

MR. LANK: He said it was a circular put out by the respondent. I offer that as Commission's Exhibit No. 10.

EXAMINER ALVORD: Let it be received.

(The paper referred to was thereupon received in evidence, and marked "Commission's Exhibit No. 10.")

By MR. LANK:

Q. That assortment was known as Keppel's Egg Assortment?

A. Yes, sir.

MR. MOHUN: Let me see that again before you question him about it. May I inquire of counsel for the Commission if this assortment is mentioned or referred to in the complaint?

MR. LANK: I think it meets the description of paragraphs Nos. A, B, or C, but probably A.

MR. MOHUN: What are those things?

MR. LANK: They are large chocolate eggs.

MR. MOHUN: Well, you have already covered this (indicating) and this (indicating) in each of those.

MR. LANK: I think it meets the terms of that, but it is not School Days. School Days also meets "a," doesn't it?

MR. MOHUN: This is off the record, please. I just want to get to the bottom of it.

MR. LANK: I expect to show that he puts out three or four assortments of this of different types. That will meet the description of "a." They take various forms and various kinds.

MR. MOHUN: I reserve the right to object. I cannot tell from this before me now whether this comes entirely within any paragraph charged in the complaint.

(Discussion off the record, after which the following occurred):

EXAMINER ALVORD: For the present I will overrule that objection.

MR. MOHUN: And I will note an exception.

By MR. LANK:

Q. Mr. Rouf, the respondent also at one time put out an assortment known as the "Square Deal Assortment," did it not?

A. Yes.

MR. MOHUN: I object. There is no reference in the complaint to any Square Deal in these three particular cases.

MR. LANK: There are eight. This is another one in "a," Mr. Mohun.

MR. MOHUN: This is a dragnet proceedings, and you are bringing out every piece of candy which is put out.

By MR. LANK:

Q. That assortment contains 200 pieces of chocolate candy of uniform size and shape?

MR. MOHUN: I object to his question. I want to get to the bottom of this, but not in that way.

EXAMINER ALVORD: The objection is sustained.

A. I don't know. That is an old number.

EXAMINER ALVORD: The objection is sustained. Strike out that answer, Mr. Reporter, on direct.

(Discussion off the record, after which the following occurred):

By MR. LANK:

Q. You do not know what the Square Deal Assortment contained; is that correct, or do you have a recollection of it?

A. No, I haven't.

Q. You do not have any recollection of it?

A. No, I do not have any recollection of it. All I can say is that it was a similar package. That is all I can say.

Q. To the package now described as School Days?

A. Yes, described as School Days.

Q. And known as Commission's Exhibit No. 8?

A. Yes, sir.

Q. Did you at one time put out the Sesqui-Centennial 1776 Liberty Assortment?

MR. MOHUN: The same objection.

MR. LANK: I think if you will let the witness tell what it is it will come within the complaint, Mr. Mohun, which depends upon my next question.

EXAMINER ALVORD: The objection is overruled. He may answer.

MR. MOHUN: An exception.

By Mr. Lank:

Q. Do you recall what that Liberty Assortment contained?

A. A similar package, I would say, with the exception that the creams were shaped like bells.

Q. Does the respondent, or does not the respondent, at various times of the year, put out various assortments? By that I mean does it during the school term put out a package called "School Days," and around Easter put out a package called the "Easter Assortment?"

Mr. Mohun: Is that the question?

The Witness: I did not know whether you had finished or not.

Mr. Mohun: I object to the question. It obviously is not complete. I do not know whether you mean Draw candies or not.

Mr. Lank: I will withdraw the question. I do not think that is necessary at all. We have got these exhibits in.

By Mr. Lank:

Q. These packages are generally known as breaks?

A. Yes, sir.

By Mr. Mohun:

Q. How do you spell that?

A. (Spelling) B-r-e-a-k, break.

Q. Does that mean draw candies?

A. Yes.

Mr. Lank: Breaks mean these draw candies?

The Witness: Breaks mean the draw candies.

By Mr. Lank:

Q. Are they also described occasionally as Picks and Takes?

A. I believe Philadelphia and New York refer to them as Picks. I believe Philadelphia and New York refer to them as Picks.

Q. Do some of the places refer to them by the double name, break and take, or pick and take?

A. Break and take; yes, sir.

Q. Break and take. Do they also refer to them as pick and take, or pick?

A. I never heard pick and take. I have heard break and take.

Q. Yes.

A. I think the originator used "Break and Take."

By Mr. Rowland:

Q. I just have a question or two I want to ask, Mr. Rouf, in connection with Commission's Exhibit No. 8, the School Days. Mr. Rouf, does the R. F. Keppel & Brother, Incorporated, put out any other package at this time of different colored centers similar to that package, other than the School Days package?

A. The School Days package I believe is the only one, and there is a Christmas package that has not been shipped as yet.

Q. That is for getting in preparation of the Christmas trade?

A. In preparation; yes, sir.

Q. What will be the difference in the candies in that?

A. Difference in shape.

Q. Similar to the Liberty package you spoke of?

A. Yes, sir.

Q. Those are the only ones similar to the different colored center candies?

A. Yes.

Q. Now, does the R. F. Keppel & Brother, Incorporated, sell any other assortment than the Big Chief's 1, 2 and 3-cent pieces, Commission's Exhibit No. 4, at this time?

A. Of the Big Chief?

MR. MOHUN: I did not understand the question.

By MR. ROWLAND:

Q. Do they have any other similar?

A. Not now.

Q. Not at this time?

A. Not at this time.

Q. That is the only one you were selling of that 1, 2 and 3 type?

A. Yes. We do not have any other now.

Q. And you have no 1, 2, 3 and 5 type, like you used to have?

A. Not now.

Q. Now, take Commission's Exhibit No. 1, the Chocolate Penny Man; do you have any other package similar to that at this time?

A. No.

Q. Are either one of those last two packages, the 1, 2 and 3, or the Chocolate Penny Man, of such a make that you would duplicate certain packages described in the other?

A. No, not in regular merchandise.

Q. Now, other than those three regular types of packages, the ones you have stated you sell, does the R. F. Keppel & Brother, Incorporated, sell any candies without such features, the 1, 2 and 3, or the center colored candies wherein you will get a prize in a package?

A. We are making one now. What do they call that? Go-Gettem, which is similar to the Peanut Chew.

Q. The Peanut Chew, that is sold at a straight price?

A. It is sold exactly like this.

Q. The witness does not understand my question. My question was: Does your company sell any candies

similar to this? What I mean is similar to these candies, to be sold at a penny, penny candy?

A. You mean similar?

Q. No, without this feature.

A. Yes.

Q. That are sold straight, at straight prices, without having any feature similar to a prize attached to it?

A. Yes, we do.

Q. What proportion of your business is that type as against this type with the prize attached?

A. Now, you are speaking of the jobbing department?

Q. You can distinguish between them if you wish, or take it by one department and then the other.

A. In the jobbing department we buy lots of outside merchandise.

Q. You buy from outside manufacturers?

A. Yes, sir. As an illustration, we buy Hershey Bars, Almond Bars, Milky Way candy, and Schrafft's chocolates, which we distribute.

Q. Now, in your jobbing department you do handle other candies that are sold at a straight price?

A. Yes, sir.

Q. Now, is that a larger business than your penny packages, or break packages?

A. Considerably larger.

Q. Now, in your manufacturing department does your company manufacture any candy sold at straight prices other than the break packages?

A. Yes, at this time.

Q. They do?

A. Yes, sir. But at this time our break package business is approximately 60 per cent. of the business.

EXAMINER ALVORD: Just a moment. You mean 60 per cent. of your manufacturing business?

THE WITNESS: Of our manufacturing business.

By MR. ROWLAND:

Q. Those other candies are similar small pieces to be sold at a penny?

A. Yes, sir; regular merchandise.

Q. And that is regular merchandise?

A. That is the regular merchandise.

Q. You say at this time 60 per cent. of your manufacturing business is the break packages. Has that been larger or smaller?

A. It has been smaller.

Q. It has been smaller in the past?

A. Yes.

Q. In other words, the break packages have increased?

A. Yes, they have increased.

Q. Over a period of how long?

A. Well, I am not sure of my dates, but we were asked to stop, it might have been six years ago, and it might have been seven, and we did stop. But they didn't make everybody else stop, and our manufacturing business went down. We were out of it for some time.

Q. That is, your whole manufacturing business did, or just the break and take?

A. Our manufacturing business did.

Q. As a whole?

A. Yes. And that was because we were simply just going into the business at that time, and had only started manufacturing for the jobbing trade in 1918.

Q. I see.

A. And we quit making them. And when the Government didn't do anything to make it general we did not see fit to leave our business go to ruin. So we followed the crowd. And we were satisfied to give good values in following the crowd, and consequently we built up a larger volume of business from year to year on the breaks.

Q. You really entered that business about six years ago?

A. Well, I am not sure of our figures. It might have been five years ago. But some time back they requested us to stop.

Q. And since that time your break business has been constantly increasing so that now it is about 60 per cent. of your manufacturing business?

A. About 60 per cent. And it would be terribly hard for us to get back in the other merchandise line for a while.

EXAMINER ALVORD: About what—and when I ask you and have you answer the question I do not expect you to be definite about the figures—is the *volume of your manufacturing business?*

THE WITNESS: The manufacturing business for our fiscal year, which ended June 30th, I think was $387,000 (consulting memoranda). No; it was $391,000.

By MR. ROWLAND:

Q. Now, Mr. Rouf, with reference to these two general types of packages, the break package and the straight package, I will call it.

A. Well, straight merchandise.

Q. Yes, straight merchandise. Take a piece of candy similar to one introduced here with the different colored centers, which sells for a penny. Is there any difference between the size of that candy being in a break package, and the one in your straight merchandise that will be sold for a penny?

A. Yes, sir.

Q. What difference will there be?

A. The straight penny candy will be a larger piece of candy.

Q. The straight merchandise will be a larger piece of candy for a penny than for the one where the prize is attached to it?

A. Yes, sir.

Q. Those packages of your straight candies, are they sold in 200's, the same size package?

A. In 120's.

Q. In 120's?

A. Yes, in 120's.

Q. And do you sell them to your jobber at the same price as the other package?

A. No. The 200's sell for $1, and the regular merchandise of 120 for sixty.

Q. Sixty?

A. Yes. There is some slight variation there; maybe 62½, depending upon the type of merchandise.

Q. There is 200 in the $1 box and 120 in the 60-cent box?

A. Yes. There are some exceptions. Some packages are packed 100. They are of different lots.

Q. Take those two there. Now, does this candy sell by weight; or is it by piece? What is your unit?

A. By count.

Q. By count?

A. Yes, by count.

Q. Well, will there be any difference in the weight or in the net value, we will say, of the 120-package sold straight, and the 200-package sold straight?

A. What are you trying to arrive at, the percentage? Do you want the per cent. derived from both?

Q. No; what I am getting at is that I understood you to say the straight pieces were larger than the break pieces which sold for one cent.

A. Yes.

Q. Well, then, the 120 pieces in the straight package would be about the same in weight, or would it exceed in weight the 200 pieces in the break packages. Perhaps I do not make myself clear as to what I am trying to get at.

A. I am trying to answer you.

Q. I understand that you are.

A. Probably if I tell you that we buy our material weight and sell it by count, depending upon the market, where we can put more or less into a box.

Q. I see. Now, let us put it this way: Is the quality of the straight package and the break package the same?

A. The same.

Q. The basis of the quality is the same?

A. Exactly the same.

Q. It is just a difference in the size of the piece the buyer gets, or whoever buys it for the penny?

A. The difference is in the matter of suggesting the resale.

Q. And what is the reason for making the difference in the size of the straight piece in the straight package and the piece in the break package?

A. To take care of the weight on the other bars.

Q. You mean by the "other bars" the prize bars?

A. Yes, the prize bars.

Q. That is to make up for the difference in the giving away?

A. Yes, sir; if the merchant decides to give it away.

Q. This 1, 2 and 3 was a piece package, wasn't it?

A. Yes.

Q. Do you now send that out as a straight package?

A. No, not now. The firm in Philadelphia have that. It was not profitable for us, so we gave it up.

Q. But you testified you have hard candy?

A. Yes.

Q. And is it sold in that way?

A. No. It is sold in barrels and jars, and sold for a penny apiece.

(Discussion off the record, after which the following occurred):

EXAMINER ALVORD: Gentlemen, we will take a recess until 2 o'clock P. M.

(Whereupon, at 12:10 P. M., a recess was taken until 2 o'clock P. M. of the same day.)

AFTER RECESS.

The hearing reconvened at two o'clock P. M., pursuant to the taking of a recess at noon.

EXAMINER ALVORD: You may proceed, gentlemen.

L. A. ROUF, the witness on the stand at the time of the taking of the recess, resumed the stand, and testified further as follows:

DIRECT EXAMINATION (Resumed).

By MR. LANK:

Q. I just want to ask Mr. Rouf another question or two before we turn him over to Mr. Mohun. Mr. Rouf, you testified, I believe, that you were selling a break package and then discontinued selling it some years ago?

A. Yes, sir.

Q. And then you began some five or six years ago to sell it; since that time the sales of that increased; I believe that is your general testimony?

A. Yes, sir.

Q. What was the reason for your starting the sale of that package again after you had discontinued it at one time?

A. On account of the loss of business. I was just telling Mr. Mohun; I don't recall where the thing originated, whether it originated within the industry,

or whether it was a state body, or who it was that got the agitation against these breaks. And some person either wrote to us, or came to see us. My memory on that is not quite clear, because Mr. Keppel handled practically all of that at that time. But anyhow, it was requested that we stop; that they were going to get every confectioner to stop; and we agreed to stop, and I believe quite a few others stopped. But some kept on, and new ones started. And we felt that it was necessary in our business to begin again, as long as the others hadn't stopped. We were losing business through it. They were in demand. People wanted them, and asked for them. And, of course, naturally in selling the breaks they drug along regular merchandise, and that left us outside the fold.

Q. You say there is a demand for them. Does the demand for the break package exceed the demand for the straight package?

A. No, it doesn't.

Q. There is not a larger demand for the break package than for the straight?

A. No; no.

Q. Still your sales are 60 per cent. break as against 40 per cent. straight?

A. Yes, because we centralized on that after we started again.

Q. Oh, you made a drive on that particular type of package?

A. Yes, we made a drive on that particular type of package.

Q. As between the two types of packages, assuming that they go to the same consumer as penny packages, would you say that there is a larger demand for the straight package than the break, or vice versa?

A. That depends a whole lot upon the conditions you come in contact with. There is more straight merchandise sold than breaks throughout the United

States, but certain channels have practically a monopoly on straight merchandise.

As an illustration, your chain stores sell today three five-cent bars for five cents. That leaves the little merchant, the independent man, high and dry. He cannot compete, because the chain stores buy merchandise at exactly the same figure as the wholesaler can. So that leaves this type of merchandise for the little fellow to eke out his existence on.

Q. By "this type" do you mean the break package?

A. Yes, sir; the break package.

Q. Would you say that the small merchant consumes mostly the break package?

A. Yes. And he is the fellow most hurt.

Q. And the straight packages are sold by the larger establishments; is that correct?

A. Yes, such as your different five and ten-cent stores have a monopoly on bulk candy, while chain stores have a monopoly on five-cent bars, which leaves the little man with the penny goods, the individual man.

Q. Now those small stores you refer to who handle this penny type of goods, is that primarily the merchant you will find located around school buildings and places of that sort?

A. You will find the corner grocer everywhere.

Q. Do you know from your own experience in the business who the ultimate purchaser is mostly of this penny package goods?

A. I would imagine the youngster.

Q. The children buy the penny stuff?

A. Yes.

Q. Do you know whether or not these break goods are put up in higher priced merchandise, such as five and ten-cent packages? I am just asking for information.

A. Oh, I believe there are five-cent ones on the market. I never heard of a ten-cent one.

MR. LANK: I think that is all I have. All right, Mr. Mohun.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Rouf, when did the respondent start to manufacture draw packages?

A. My idea of that would be that it was along about 1922 or 1923.

Q. Were you the first in the field?

A. No. It originated in Philadelphia.

Q. Then you discontinued it, I understood you to say?

A. No; possibly six months after it originated.

Q. Yes.

A. And we had constant calls for it, and then we made them again.

Q. And you resumed how soon?

A. And then we made them, and then we were asked to discontinue them, which we did, and then began possibly six or eight months after we had said we would discontinue them.

Q. If I understand you correctly, you discontinued for a period of from six to eight months?

A. I would say six or eight months.

Q. After you started them?

A. Yes.

Q. In regard to the several display cards and the packer's slip, I notice, for example, on the outside of the box, at the end of Exhibit 4, there are statements in which the name Keppel appears, but there are various statements on the display cards, and I desire to inquire in that connection whether there is any statement which has been offered in evidence here, put out

by your company, which in any manner is false, misleading or intended to be such.

MR. LANK: I object to that. If the Examiner please, the statements speak for themselves. We are not making any effort to show that the statements, or the scheme here is a false, misleading, or untrue statement. There has been no effort to prove that they were such, and I object to the question as not being responsive to the direct examination.

MR. MOHUN: Obviously, Mr. Examiner, the statements on these packages do not speak for themselves. This witness has within his knowledge as to whether or not the statements are false or untrue.

EXAMINER ALVORD: There is no charge in the complaint of false and misleading advertising. I see no objection to this witness explaining any statement that is on these cards.

MR. MOHUN: Of course I could get the information by taking up each of these exhibits and asking this witness if the statement were true or false. I think your Honor would allow that. I tried to save time by grouping it.

MR. LANK: My objection went to the——

EXAMINER ALVORD (interposing): Wait a moment. We won't argue the question at all. The objection is sustained. There is no charge of any false statement, or false or misleading advertising involved in this case. I think it is fair to presume that the statements contained on those cards are true.

MR. MOHUN: I note an exception, please.

By MR. MOHUN:

Q. Was there ever any intention on the part of Keppel & Company to deceive the public in any respect, either that the goods which Keppel & Company produced were the goods of another, or by any statement or action of any kind?

MR. LANK: Just a minute. If your Honor please, I object to that on the ground that I do not know whether this witness can testify as to what was the intention to deceive of Keppel & Company. There has been no effort to prove, and there has been no charge made of any intention to deceive the public or the consumer.

EXAMINER ALVORD: The objection is sustained.

MR. MOHUN: I note an exception, please.

By MR. MOHUN:

Q. How were your goods sold, Mr. Rouf? I mean what were the terms of sale?

A. Terms of sale?

Q. Was it an absolute, conditional, partial, or with any restrictions whatever?

A. It was absolute.

Q. So the title passed when the goods were sold?

A. Yes.

Q. Did you ever exercise control, or ever attempt to exercise control over your purchasers, or the wholesale dealers, jobbers, and retailers, with respect to the manner in which these candies were to be sold?

A. No, sir.

Q. Do you have any authority to attempt to exercise any control?

A. No, sir.

Q. Now, in response to the two general classes of candies which you manufacture and sell, what is the relative profit from them? I do not mean in dollars,

but I mean do you make more from draw sales than you do from straight sales, or the reverse?

A. We try to scale our profit the same on all merchandise that goes through our factory. There is no more advantage in selling one than the other. We try to determine a set profit on everything that we make.

Q. So that if I went into a store which had, for example, a box of Big Chief, if I went into a store and bought the entire box of Big Chief one at a time, would I get a fair return on my money, compared with the market value of similar candies?

A. You would get value for your money.

Q. Do you recall when it was your company withdrew from the National Confectioners Association?

A. I would imagine that was——

EXAMINER ALVORD (interposing): I didn't get your answer.

THE WITNESS (continuing): Why, I was just trying to think. Why, I could imagine about three years ago.

By MR. MOHUN:

Q. And it was because of divergences of opinion amongst the members?

A. Yes.

MR. LANK: Just a minute. If your Honor please, I object to that, unless Mr. Mohun is making him his own witness for some purpose. I do not see just where he is leading, and I let him ask the first question, but I do not know that that is responsive at all to the direct examination, nor do I see that it is material here.

MR. MOHUN: You brought it from the witness. I did not.

MR. LANK: Oh, no.

MR. MOHUN: Oh, yes; you remember that, Judge. He brought it out.

MR. LANK: I did not ask him about any Confectioners' Association that I recall.

(Discussion off the record, after which the following occurred):

EXAMINER ALVORD: The objection is sustained.

By MR. MOHUN:

Q. What is your information with respect to the number of wholesalers and jobbers who handled draw pieces of candies in the United States?

A. Wholesalers and jobbers?

Q. In the United States, yes.

A. I believe it is pretty near universal wherever any manufacturer touches and makes this type of merchandise; I would say 99 per cent. of the people handle them; that is, excluding, of course, those chain store outfits that I have mentioned.

Q. So the respondent's contact with the public—I mean in the matter of sales—consists wholly of dealing with jobbers and wholesalers, and in the instance you mentioned, in Cecil County, Maryland?

A. In the jobbing department?

Q. In the jobbing department of your company.

A. Yes, for wholesale.

Q. That is exclusive, is it not, your only contact with the public?

A. That is the only contact with the public.

Q. Is the jobbers, wholesalers, and the few retailers?

A. Yes.

Q. Whom you mentioned in Cecil County, and that contact being made through your jobbing department?

A. Yes.

Q. How do you sell your candies, by salesmen?

A. By salesmen.

Q. And also by mail, I suppose?

A. We have circulars that we send out periodically.

Q. Has there ever been any complaint on the part of your competitors in respect to the sale of draw pieces?

MR. LANK: If he knows, and the details of those objections.

MR. MOHUN: I have not said there were any. I asked him if there were any.

EXAMINER ALVORD: You may answer.

MR. LANK: I have an objection unless he does refer to the details, and who made them.

EXAMINER ALVORD: That is a matter you can bring out on re-direct. The objection is overruled.

MR. LANK: I object to that now. The question was whether he had any.

A. Well, I want to make it clear; that is all.

MR. ROWLAND: I suggest that the question be answered yes or no first, and then that it be developed later.

A. No, it is, with reservations.

MR. MOHUN: He cannot answer it yes or no.

(Discussion off the record, after which the following occurred):

MR. ROWLAND: My point simply was, as I recall Mr. Mohun's question, he asked you whether you had any objections. I think that could be answered first yes or no.

THE WITNESS: Whether we had any objections?

MR. ROWLAND: Whether you had received any complaints.

MR. MOHUN: You are really changing the question.

By MR. MOHUN:

Q. The question was whether there had ever been any complaint on the part of the manufacturers of draw pieces.

MR. ROWLAND: Answer yes or no.

A. No.

By MR. MOHUN:

Q. Have you any explanation of that?

A. The explanation is that the man who does not make any objected to it. The competitors who did make them had no objection.

Q. Did you say that competitors who did not make them objected to them?

A. The competitors who did not make them in some instances objected.

Q. To whom were those objections made?

A. To the National Association.

Q. But I asked you if your company had ever received any objections.

A. Oh! Our company? No.

Q. Did you ever sell candy below cost?

MR. ROWLAND: I will object to the question, because I do not think that under the issues here that that question as to whether or not the respondent sold candies below cost has anything to do with what we are trying out here.

(Discussion off the record, after which the following occurred):

EXAMINER ALVORD: I think I will save the witness embarrassment and sustain the objection.

By Mr. Mohun:

Q. Is there any difference in effect between the jobber and a wholesaler?

A. Well, I don't know of any.

Q. Has there ever been an instance where respondent refused to sell to any jobber or wholesaler, or any other person, on any grounds whatever, if you were able to fill the contract?

Mr. Lank: I object to that question in that form, because it leaves it open for anything under the sun to come in. He does not say these packages, or any particular package, or did a manufacturer ever refuse to sell to a jobber anything for any reason, I do not see how that can possibly be material in this case.

Examiner Alvord: Read that question, please. I did not get the question.

(The pending question was thereupon read by the reporter.)

Mr. Mohun: I meant it to read draw pieces.

Examiner Alvord: I do not see the materiality of that question. It may have something back of it. The objection is sustained.

By Mr. Mohun:

Q. Has there ever been any refusal to sell to a jobber or a manufacturer or a retailer because of the failure of the retailer to sell in any particular manner these draw pieces?

A. No.

Q. Do you remember what year it was when a representative of the Commission called upon your Mr. Keppel?

Mr. Rowland: I object to that. I do not think it is proper cross-examination. As I recall, there

is nothing in the direct examination that any member of the Commission ever called on him.

MR. MOHUN: It is in the record. Maybe I will put one of the Commission's letters in evidence.

MR. ROWLAND: I think at any rate that would be proper on direct examination when counsel makes him his own witness.

EXAMINER ALVORD: I might say for the benefit of counsel that the rule is that a strict cross-examination prevails in the proceedings before the Commission.

MR. MOHUN: You say the strict rules do prevail?

EXAMINER ALVORD: The rule of strict cross-examination.

MR. MOHUN: I won't take the time to detain. I do not seem to have brought the letters from the Commission with me.

By MR. MOHUN:

Q. Do you recall that there was a visit of a representative of the Federal Trade Commission?

A. Yes; I know of a visit.

Q. At your plant?

A. Yes.

Q. But you could not say what was the best estimate as to when it occurred?

A. I would have to guess at that.

Q. I beg your pardon.

A. I would guess it was about three years ago.

Q. Your best estimate is that it was about three years ago?

A. That would only be a guess on my part.

MR. MOHUN: I would like to serve notice on counsel—if he wants it in writing it will be done—

that a notice to produce the first communication from the Commission to this company is made.

MR. LANK: If your Honor please, to that I won't demand a written notice to produce. So far as that is concerned, I do not see where this is leading us. I may not have any objection if Mr. Mohun feels inclined to offer what he expects to prove by it, but I certainly object at this time, because I do not see the bearing on this case; neither do I see that it is responsive to the direct examination as to when some employee of the Commission called on the respondent, or when some employee has written the respondent.

The Commission's action is shown by its complaint at the moment, and that is all that respondent has to answer, and all we are required to prove is the allegations of the complaint.

EXAMINER ALVORD: Just a minute. I have no authority to require the counsel to produce anything.

MR. MOHUN: Yes.

EXAMINER ALVORD: But if you want that letter I have no doubt that if you will ask the docket section to produce the letter they will do it. But it is not cross-examination at this time.

MR. MOHUN: No, sir. You are quite right, sir.

EXAMINER ALVORD: If you want to use it you can use it for the defense when you come to put in the defense.

MR. MOHUN: I hope it will not be necessary.

EXAMINER ALVORD: I have no doubt but what these gentlemen want to produce it for you.

MR. MOHUN: I think so.

EXAMINER ALVORD: As to whether or not it is material I do not know; I do not have it before me.

(Discussion off the record, after which the following occurred):

By MR. MOHUN:

Q. You know, I believe, that the respondent has been visited by representatives of the Commission?

A. Yes.

Q. Has the respondent at all times furnished all requested information and given to the representatives of the Commission full access to their books, records, and papers?

A. Yes.

MR. MOHUN: Now, if you insist, he is my witness.

By MR. MOHUN:

Q. Did your company belong to an association, or did it ever belong to one?

A. It did belong to the National Confectioners' Association.

Q. I judge from its name that that is a national organization?

A. Yes.

MR. LANK: It is noted here that the witness is now the respondent's witness, and not the Commission's witness.

MR. MOHUN: It is not important. You so ruled, Mr. Lank.

EXAMINER ALVORD: It is for the counsel to determine for himself that he is asking a question as a part of his cross-examination. If not, then it is subject to objection as not cross-examination, and if he wants to make him his own witness for this purpose why that is up to counsel.

MR. MOHUN: I am quite willing to, sir.

EXAMINER ALVORD: Very well.

By MR. MOHUN:

Q. Please state concisely when the respondent became a member of the National Confectioners' Association, how long it remained a member, in the event it severed its relations therewith, when that occurred, and why, and whether or not you ever rejoined?

MR. ROWLAND: I object to that unless it is understood Mr. Rouf is the respondent's witness.

MR. MOHUN: That has been understood, and it was said deliberately.

MR. ROWLAND: I just want to be sure.

EXAMINER ALVORD: I would like to suggest this. I do not rule the question out on these grounds particularly, but the question is not only double, but it contains three or four questions, and we will keep this record in better shape if counsel will withdraw that question and ask them one at a time.

MR. MOHUN: And break it up. Yes, sir, I will. You can kill it on the record if you want to.

By MR. MOHUN:

Q. When did respondent become a member?

A. These are all approximate fixures. I would say about 1919.

Q. Is that an old association?

A. Yes.

Q. Do you know approximately how old?

A. No, I don't.

Q. Do you know approximately how many members it had at the time you joined it?

A. I wouldn't have any means of knowing that.

Q. Did you state when you joined it?

A. Yes.

MR. ROWLAND: 1919, about that.

MR. MOHUN: Yes.

By MR. MOHUN:

Q. And how long did respondent remain a member?

A. I think we were a member until about 1926.

Q. Have you ever rejoined it?

A. No.

Q. Why did respondent sever its membership?

MR. ROWLAND: I object to the question unless counsel can show it has some bearing on the issues in this case.

MR. MOHUN: It does have some bearing. The controversy arose over these very draw candies.

EXAMINER ALVORD: I beg your pardon.

MR. MOHUN: The controversy arose over these very draw candies. Of course, I do not like to lead the witness.

(Discussion off the record, after which the following occurred):

EXAMINER ALVORD: Very well. The objection is overruled.

A. On account of the activities of the National Confectioners' Association in stopping the sale of these particular packages.

By MR. MOHUN:

Q. You mean on the part of its members?

A. Yes.

Q. Did any of those withdraw, do you know?

A. Yes; there were some others who withdrew.

Q. You say on account of the activities of the association in attempting to stop the sale of these draw pieces? Would that have hurt you?

A. It naturally would hurt us, so we didn't feel satisfied to pay into an association that was trying to put us out of business.

MR. MOHUN: I think that is all, Mr. Lank.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Rouf, did you testify in direct examination this morning that you did stop it for a while, and then only again began the distribution because of the competition that others manufactured them, and if you wanted to sell candy you would have to put out this package?

A. Yes.

Q. If the efforts of the National Confectioner's Association had been successful and all manufacturers stopped it would you have had any objection to stopping it?

A. No, sir.

Q. You say that the only objections—I think you put it—that the only manufacturers who objected to this form of package were those that did not manufacture it, and those who did had no objection to the manufacturing of it?

A. Yes.

Q. Do you know whether that is universal throughout the trade?

A. That I couldn't say; I know of some people who voiced their opinions.

Q. Then largely that statement by you is your own opinion of how the industry feels on it; is that true?

A. Well, these several that I know of, the fact that the members in the association tried to stop it I know that it was fairly far-reaching, maybe very far-reaching, for all I know.

Q. Do you know that manufacturers who do manufacture this package are universally in favor of its manufacture?

A. That I couldn't tell you.

Q. And you do not know whether there are a number of manufacturers who do manufacture it and object to its manufacture?

A. That I couldn't answer.

Q. Mr. Mohun asked you if a consumer came in and bought the entire package of Big Chief, sixty bars, I think it is, if he would get his money's worth, and you answered yes; that is correct, is it?

A. Yes.

Q. If a child came in and bought three or four pieces of that candy the amount he would have to pay would be determined wholly by chances, would it not? It might be three cents and it might be nine, if he bought three bars.

A. Yes.

Q. There would be no way of determining what he was going to have to pay before he bought the three bars, would there?

A. No.

Q. If he bought the three bars and paid nine cents for them he would not get what we would expect to be the value for his money, would he?

A. Just how do you mean?

Q. I mean it by this: You say here is sixty bars of candy; ten of them retail at one cent; ten of them retail at two cents; forty of them retail at three cents. If he buys the whole sixty bars for a dollar and a half he will get his money's worth?

A. He will get value, yes.

Q. But sixty bars for $1.50 is not three cents a bar, is it?

A. No.

Q. And if he bought three bars, and only three bars, and paid nine cents for them, he wouldn't get the same value for his money if he bought in a ratio?

A. No.

Q. As if he bought the whole package?

A. No.

Q. Using these Big Chiefs as an example, the same would apply to the School Days, and would also apply to the Chocolate Penny Man, would it not, or possibly the Chocolate Penny Man would be put in a little bit different category?

A. That would be in a different classification.

Q. There are only four men in the 120 which have a penny within them?

A. Yes.

Q. That is a pretty small game of chance, or a long chance that the consumer takes there?

A. It is a pretty small game of chance, yes.

Q. Maybe I have stated it wrong, but he does not have much chance of getting the penny?

A. I think you are right.

Q. But incidentally there is nothing in that package that tells the ultimate consumer how many pennies there are in them, is there?

A. No.

Q. All the other packages I think disclose how many prices there are for the package?

A. The suggested card tells that.

Q. The suggested card tells that?

A. Yes.

MR. LANK: That is all.

MR. ROWLAND: I want to ask a few questions.

By MR. ROWLAND:

Q. You said on cross-examination, Mr. Rouf, that someone, you didn't recall who, from some State body

or some other organization, came to you and asked you to stop making this package and you acceded to it. Was that from the National Association that you refer to later, or do you know?

A. No. That was very vague. I remember the request being made. I am not trying to evade anything.

Q. I realize that.

A. It might have come from the organization, and it might have come from the authorities, or from the association. I have no recollection where it originated. We were very glad to go along and quit.

Q. You also testified that there was a demand for this draw or break package. Who did that demand come from?

A. The little independent stores.

Q. Through that channel?

A. Yes, but it comes through the wholesalers, because we do not contact enough with the retailer.

Q. In other words, you hear of it from the wholesaler who gets it from the retailer?

A. Yes.

Q. But there is a constant demand for that type of package?

A. A constant demand.

Q. Did your company have a constant demand for that type of package during the time you ceased making it, a continuous demand for it during that time?

A. Yes, sir.

Q. Now you testified also that the National Association, National Confectioners' Association, endeavored to have this type of package stopped?

A. Yes.

Q. They took that up with their own members, did they, to endeavor to get their own members to stop making this type of package, or selling it, rather?

(Discussion off the record, after which the following occurred):

Q. I will just ask you, in view of your statement off the record, Mr. Rouf, whether or not you will, or can state to the best of your recollection as to what your recollection is as to the action of the National Association in trying to stop the sale of this package?

A. This is off the record?

Q. No. This is on the record. Give it so far as the best of your recollection goes.

A. I know of being in Chicago; I am not sure whether it was three or five years ago; and the subject was brought up in one of the rooms in an evening gathering.

By Mr. Mohun:

Q. Was that a meeting of the association?

A. After the meeting.

Mr. Mohun: Pardon me, Mr. Rowland.

The Witness: The Association was going on record as being against this type of merchandise, and I think they engaged counsel in Washington to go into the matter.

By Mr. Rowland:

Q. Now did your company while a member of the association ever receive any official notice of any kind from the association of its activities against, or requesting you to stop this type of package?

A. I would think in their pamphlets that it did.

Q. Was any officer of your company ever an officer of the National Association?

A. No.

Q. Never has occupied any office in the association?

A. No.

Q. Now if you recall what basis of grounds did the National Association put for its objection to this type of package?

A. The objection was brought about by some of the merchants who did not make them.

Q. I mean they were the ones instigating it, you say, but on what grounds did they object? Do you recall what was the basis of the objection? Why did they object to this type of package; do you remember?

A. No, I don't remember.

Q. You don't recall as to what their reasons were for objecting to it?

A. No, I don't.

Q. I believe you did state that none of your competitors had ever objected to your company making that type of package?

A. That is right.

Q. None of them have, so far as you can recall?

A. So far as I know none of them ever have.

Q. You don't know what the objection of the National Association was to the sale of this type of package, why they tried to stop it?

A. No, I don't.

Q. Does your company as such have any objection to this type of package? Would you rather not sell this type of package?

A. That is a pretty hard question right now.

Q. What do you mean?

A. Well, I mean for us getting from the red into the black.

Q. It has been a profit-maker, in other words?

A. It has helped in the volume of business. It has made no more profit than the regular merchandise, but it gives us additional business and puts us in the profit column instead of the loss.

Q. For that reason you favor the package?

A. For that reason we favor the package, self preservation.

Q. I believe you said that at the time you were first requested to stop making the package you did so and were glad to do so, I think your words were.

A. Yes.

Q. Why were you glad to do so? Was there any particular reason why you were willing to discontinue this type of package and did not object to discontinuing?

A. Well, some people didn't look with favor on this type of merchandise.

Q. Some of your customers?

A. No; I would say the other manufacturers.

Q. So far as your company itself is concerned, the policy of the company itself, have you any objection to selling that type of package?

You only do it because of the fact that others are doing it, and it has helped you to do a volume of business?

A. Well, that is primarily about the thing in a nut shell.

Q. You would be willing to discontinue the package if your competitors discontinued it?

A. If the whole industry discontinued it.

Q. Have you any thought or any feeling on the matter, your company, or you personally, on the ethical or moral ground of this type of package?

MR. MOHUN: An objection.

EXAMINER ALVORD: The objection is overruled.

A. No, I have not, because it is too picayune.

MR. ROWLAND: That is all.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. Just one question. In order to get an accurate view of the action of the association in opposing the manufacture of draw pieces, that action resulted in what might be called, in the language of the street, a split in the association, I believe, in that I mean a

number of members like your company resigned; is that correct?

A. Yes.

Q. Could you give me an approximate idea of the percentage of those who resigned?

A. I couldn't.

MR. MOHUN: That is all.

RE-DIRECT EXAMINATION.

By MR. ROWLAND:

Q. I understand there is a local association of confectioners in addition to your national body? Are you a member of any local or regional association?

A. Pennsylvania State.

Q. Pennsylvania State Association. You are a member of that now?

A. Yes.

Q. Has that association ever taken any action, official or otherwise, so far as you know, on this draw package?

A. Never to my knowledge.

MR. ROWLAND: That is all.

(Witness excused.)

MR. LANK: Mr. Smith is the next witness.

P. M. SMITH, was thereupon called as a witness, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Your full name, Mr. Smith, please?

A. P. M. Smith.

Q. You are connected with what company?

A. President and treasurer of Allen & Smith Company, Incorporated.

Q. Where are they located?

A. 17 and 19 North Twentieth Street, Richmond, Virginia.

Q. In what business is Allen & Smith engaged, Mr. Smith?

A. The manufacture of confectionery, specializing in peanut products.

Q. And how long has your company been so engaged?

A. Twenty-three years.

Q. How long have you been connected with the company?

A. Twenty-three years.

Q. Is it also your connection with the candy industry, twenty-three years, or greater?

A. Thirty-three years; ten years with another concern as an employee.

Q. Mr. Smith, are you familiar with the so-called breaks or pick packages that we have under discussion here?

A. I am.

Q. Does your company manufacture and distribute such packages?

A. It does not.

Q. Do you have any reason why you do not do it? That you can answer yes or no, I think, possibly.

A. Yes.

Q. What is that reason?

A. Because we are opposed to the gambling scheme entering into it. Some of our competitors make them, but we do not.

Q. Your only reason for it is because you object to the gambling scheme involved?

A. The principle involved in it, yes.

Q. Can you state that a little bit more in detail as to the gambling scheme involved, and your objections to it?

A. Well, as a rule a manufacturer of peanut specialties and products puts up a nickel package of peanuts as a by-product, and in it he puts money and premiums. Our company has been opposed to educating the child to gamble. And for that reason we have never entered that line.

MR. MOHUN: I did not understand you. Who did you mean to say put a nickel in them?

A. As a rule some manufacturers of peanut specialties and by-products put up peanuts in order to get rid of low-grade peanuts, in which they put prizes and cash premiums.

By MR. LANK:

Q. Does your company also have any ethical objections to putting out a package which involves gambling?

A. We have. We feel the principle is wrong, and that a gambling scheme diverts from the true distribution of candy. In other words, it works from the distribution of candy in that a child will spend his money on a gambling scheme rather than for distribution of candy.

MR. MOHUN: Mr. Examiner, this witness is testifying to his opinion. I can't see that has anything to do with it. Somebody else may call it something else. What this witness thinks about it, I cannot see that that is pertinent. He is not qualified on morals or gambling.

EXAMINER ALVORD: The question has been answered.

MR. MOHUN: Then I move to strike it.

EXAMINER ALVORD: The motion is granted.

MR. LANK: Will your Honor permit me to argue it a little bit before you rule on it?

EXAMINER ALVORD: I do not think it needs any argument. The question is what effect this gambling scheme, as you call it, has upon competition.

MR. LANK: I thought that would get us right to that. I figured these questions were a foundation for it.

EXAMINER ALVORD: You will go on with your next question, and we will see.

MR. LANK: Please allow me an exception, at least.

By MR. LANK:

Q. You are familiar, I believe you testified, with these packages, Mr. Smith?

A. Yes.

Q. Are you familiar with the type of candy generally found in those packages?

A. You mean by that the make-up of them, the quality?

Q. The make-up, the quality, and the quantity, yes.

A. Yes.

MR. MOHUN: What are we talking about; what candies? Do you mean this (indicating)?

MR. LANK: Of these packages. I am going to ask him about the break and pick packages.

MR. MOHUN: Of what company?

MR. LANK: I asked him if he was familiar with them generally.

MR. MOHUN: He was speaking about a peanut bar being put out. Are you still talking about that?

MR. LANK: I think the answer speaks for itself. I asked him if he was familiar with these packages, Mr. Mohun.

By MR. LANK:

Q. Your company has never put out these packages, you say?

A. It never has.

Q. Do you know when these breaks or pick packages first came generally on the market?

A. I entered the confectionery business in 1898. I see a piece on the table they were making then known as "Money Babies," and the company I was with, that was the best seller they had. Later they had to discontinue making them on some ruling of the Government that money could not be used as a premium in candy on account of the gambling feature of it. The piece of goods we put it in was just about as common as could be made and as small, and it was the pennies in it that sold the piece.

Q. When you withdrew from the manufacture of that type of package what effect did it have on your business, Mr. Smith?

A. Well, when you stop putting the pennies in that piece of goods the piece immediately died.

Q. What effect did your failure to continue the manufacture or to make break and pick packages, as they are so called, have on your business, Mr. Smith?

A. We had a falling off in the volume of that item. As to the dollars and cents effect, I am not in a position to testify.

Q. Are you able to meet competition where the manufacturer does make a break package?

A. How was the question?

Q. Are you able to meet competition with the manufacturer who does make a break package?

A. The competition of a make and break package affects me this way: I don't know that this is the answer you want. This is not for the record.

MR. MOHUN: Answer it. The witness is not to determine that, whether it is for the record or not.

THE WITNESS: It was not quite clear to me. Would you please give me the question again?

MR. LANK: Repeat the question to him, Mr. Reporter.

(The pending question was thereupon read by the Reporter.)

A. I will answer that in this way: That I do not make a break package, but the attraction of the make and break package in its appeal to the child detracts from my sale of my products.

MR. MOHUN: I move to strike out the answer and ask that he answer the question.

EXAMINER ALVORD: Just a minute. I did not hear the answer.

(The answer was thereupon read by the Reporter.)

EXAMINER ALVORD: The answer is hardly responsive to the question, but it strikes me the answer is quite material. I think I will let it stand.

MR. MOHUN: I note an exception, please.

By MR. LANK:

Q. What effect, Mr. Smith, does—this may be, if your Honor please, a repetition, but it possibly is wise to get it in with a question to which the answer would be responsive—the manufacture of the pick and take have on your business?

A. It detracts from my sales in that the child through the gambling appeal will spend his last penny

almost on a gamble item and pass up the items of real value.

Q. You say you have been in the candy business for thirty-three years?

A. Yes, sir.

Q. And in that time I suppose you have come in contact with numerous and various forms of competition?

A. I have.

Q. Don't answer this next question until the other side have had a chance to object. Do you think the manufacture of a break and take package is a fair or unfair method of competition?

MR. MOHUN: I object.

EXAMINER ALVORD: The objection is sustained. That is the precise question which the Commission will be called on to decide from the facts proven.

MR. LANK: I thought possibly the witness might give his opinion of it.

EXAMINER ALVORD: That is subject to expert testimony. If a man can tell how he meets this form of product in his trade, what effect it has upon his sales, and whether it has an effect upon his sales, if we get that you have something for the Commission to consider.

MR. LANK: Pardon me. Would you read the Examiner's statement?

(The statement of the Examiner was thereupon read by the reporter.)

By MR. LANK:

Q. I believe you testified that it did detract from your sales, Mr. Smith?

A. Yes.

Q. And I believe you testified that because it appealed to the gambling instinct that they bought to gamble and not the candy?

A. That is true.

Q. Now you also said you were familiar with these packages generally, Mr. Smith. Are you familiar with the quantity, or the value that the ultimate consumer gets when he buys one of these pieces of candy?

A. Not all of them, but there is some that have come under our observation.

Q. Yes. And with regard to those, what is your answer as to the value that the ultimate consumer gets for his money?

A. Well, the majority of the draw packages I have seen in the penny style, why the child gets about one-third value for what he actually gets for his money otherwise, unless he gets a capital prize.

Q. And if he gets the capital prize?

A. If he gets the capital prize he gets more than his money's value, probably a nickel value or a ten-cent value.

Q. And looking at this package, which is Commission's Exhibit No. 8, the testimony is that if the child gets a chocolate center when he purchases he gets one of the pieces of candy in the form of a pair of twins, so designated by the display card of the respondent. Would you say that he was getting more than his penny's worth if he got that pair of twins with his purchase?

A. I would say he was getting at least a dime's worth, possibly fifteen cents worth.

Q. And if he gets a pink center when he purchases one of the pieces of candy of uniform size and shape he gets what is designated by the respondent as a school-boy or girl, being a piece of candy in the shape of a child, would you say there that the ultimate consumer was getting his money's worth?

A. I should say he was getting ten times his money's worth.

Q. Now if a display card with that package says that one piece of cream with a white center is one cent would you say that if he bought one of the pieces of candy of uniform size and shape and it had a white center, that he would get his penny's worth?

A. I should say he was getting not more than half a penny's worth, judging by the sale of chocolate penny candies that are sold for a penny.

Q. The display card also states that the last piece of cream and the school companion are a penny. Would you say that that child got his penny's worth, or how much would he get for his penny?

A. Judging by the appearance of that I should say he got about fifteen cents for his penny, or about twenty cents for his penny, or more.

Q. Do you sell your product through jobbers, or do you sell direct to the retailers?

A. Entirely to the jobbers.

Q. Do you have any demand from the jobbers to whom you sell for a break package?

A. We have had a demand for a nickel package of peanuts, which is known as a break package.

MR. LANK: Mr. Rowland has some questions.

By MR. ROWLAND:

Q. You say you have had a demand, Mr. Smith, from some of your customers for a break package?

A. Yes. That is because our competitors made them.

Q. In other words your customers, when you refer to your customers you mean jobbers?

A. Jobbers, yes, sir.

Q. Have you any competitors that are making a similar type of candy, or other goods, to this, such as a break package that comes in competition with you in selling this type of package?

A. You mean by that exclusively peanut candy manufacturers?

Q. You are an exclusive peanut candy manufacturer?

A. Yes.

Q. Yes.

A. Any candy manufacturer is a competitor when they make the same type of merchandise.

Q. And have you any direct competitors who do make this type of break packages?

A. Yes, lots of them.

Q. And also peanut breaks of candy?

A. No, not the peanut breaks of candy.

Q. They do not make any breaks in peanut candy?

A. No.

Q. But in other types they would be?

A. Yes; competitors in a general way. One competitor in candy is a competitor with another one.

Q. This respondent makes Peanut Chew. Would that be in competition with your type of goods?

A. No, sir.

Q. I was out of the room when you stated what you make. Do you make candies in general, or just peanut candy?

A. I make candy, specialize in nickel and penny lines, bulk stuff.

Q. But you don't make any of that type of peanut candy at all (indicating)?

A. No; no chocolate goods at all.

Q. Now, you said this type of package had an effect on your sales, on your business?

A. Yes.

Q. How do you know it has an effect on your business?

A. Simply from the fact that I have watched around stores where draw pieces are on sale and seen children time and again spend their last penny on the

draw packages. In the ordinary course if a child had a nickel to spend he would get five assorted pieces of candy. When he gets the draw package he will draw until his money is gone.

Q. You have seen that yourself?

A. Yes, sir, I have seen that myself.

Q. Do you sell through salesmen?

A. Yes.

Q. Have you ever had any of your salesmen come to you and ask for the break type of package?

A. Never had them ask for the break package, but they will tell us what the break package does in a general competitive way.

Q. Have you ever had any of them tell you they have met it in competition when attempting to sell your goods, met this other package?

A. No.

Q. It has not so far as you know affected your sales through the reports you have received from your salesmen?

A. No, other than this, that the greatest sellers were the draw packages; that they were the popular appeal.

Q. You know that?

A. Yes, sir. I know that through the reports of my salesmen to me.

Q. That is what I was trying to get at.

A. Yes.

MR. MOHUN: That is hearsay evidence, and I object and move that it be stricken.

EXAMINER ALVORD: Those are reports made in the usual course of your business?

THE WITNESS: Yes.

EXAMINER ALVORD: From salesmen to you as the manager of the concern?

THE WITNESS: That is true, sir.

EXAMINER ALVORD: Did you ever investigate any of those reports to find out whether they were true or not?

THE WITNESS: I have not.

EXAMINER ALVORD: The objection is overruled.

MR. MOHUN: And note an exception.

By MR. ROWLAND:

Q. Do you make any penny goods?

A. Yes, sir; very largely; a large percentage of our output is penny goods.

Q. How does the penny goods that you sell compare in size or quality with the penny goods introduced in evidence here as made by this respondent, if you have any comparable articles?

A. I haven't seen the penny goods introduced.

Q. Here, we will show you. This is the penny and then here are the creams.

MR. MOHUN: Referring to the exhibits for the record.

By MR. ROWLAND:

Q. First referring to Exhibit 8.

A. The size of my penny piece is about four times as large as that. It is a different type of merchandise. Mine is peanut candy and this is chocolate.

Q. So you don't make any comparable article with this one?

A. Nothing.

Q. Nothing at all?

A. No, nothing.

Q. Now these salesmen that made these reports to you as to the competition of this type of goods and the demand for them——

A. (Interposing.) May I correct this? I said four. I would like to say three. That is so thin and mine is so thick that it is hard to draw a comparison between the two pieces. That is the whole story.

Q. I see. These reports you refer to as having been made to you by your salesmen in the course of their sales reports, where did they come from, what sections of the country?

A. All over the country. We work from Maine to Texas, and as far west as the Mississippi.

Q. You receive reports from your salesmen along this general line?

A. Yes.

Q. To the effect that there is a bigger demand for the break package than the straight is that correct?

A. Yes, that the draw packages were selling, and about the only thing that was selling, and that the public was crazy on this draw scheme game.

Q. Have you ever considered the possibility of going into or putting out a break package?

A. No, I have not.

Q. In view of the reports of the demand and the sale for those packages why haven't you gone into those packages?

A. Because I am opposed to it on principle. Another reason was that our merchandise is not readily adaptable to the draw scheme.

MR. ROWLAND: That is all I have.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. How old are you?

A. Fifty-one.

Q. Do you gamble?

A. No.

Q. Do you play cards?

A. I do not.

Q. Did you ever play poker, or any other game for money?

A. No, never have.

Q. Never have. You were not opposed to gambling in 1898 when you were putting out draw pieces.

A. I had no say then. I was an employee.

Q. Is Smith in the name of your firm?

A. Yes, sir.

Q. Was that true in 1898?

A. I was not working for myself then.

Q. You had no say?

A. I was not in business then with the Allen-Smith Company in 1898.

Q. I didn't hear you.

A. I was not in business with the Allen-Smith Company in 1898. I have worked ten years for somebody else and been in business for twenty-three years, which would throw me back to 1898.

Q. Who were you working for in 1898?

A. R. H. Hardesty Company.

Q. You never indulged in gambling of any kind or character?

A. Nothing more than marbles when a boy.

Q. You used to play for keeps, didn't you?

A. Yes, sir.

Q. You said, Mr. Smith, that the sale of draw pieces—I think I can quote you correctly—detracts from sales, and in the same sentence, in the same breath stated that it teaches children to gamble. Which is the predominant influence on your mind as to why your company does not manufacture draw pieces? Which is the most serious objection on your part to draw pieces being manufactured by others, that it detracts from your sales, or that it teaches these children, in whom you seem most solicitous, to gamble?

A. The gambling idea is predominant with our concern, the opposition to the gambling idea. I might add that I am largely concerned there. I have a boy of my own. I like to keep him away from those temptations, and I try to keep him away from those things.

Q. And your company has never manufactured these things, has it?

A. No, sir.

Q. Now, in your comparison with what you put out in this article in Exhibit 8 you stated that the piece which you sold for one cent in size was a third again larger, or which implied that it would be three times as large; is that correct?

A. Yes.

Q. Do you know as a matter of fact that peanuts are cheaper than chocolate cream?

A. I do not.

Q. You do not know that?

A. No, sir. There are different grades of chocolate cream. The peanut is very much cheaper. But there are grades, low grades ar high grades, and some chocolate creams that are made are hardly fit for human food.

Q. Are these peanuts you speak of, and which you evidently had in mind when answering that question, were they more expensive or less than the chocolate with the cream inside?

A. To answer that question intelligently I would have to know what kind of chocolate cream; I don't know the quality of that cream; I haven't eaten it.

Q. Well, you have answered the question supposedly intelligently. Now, what did you mean?

A. I mean this, for a high-grade chocolate of the best material and best quality, that my peanut candy is not as costly, as costly as that is. There is more value in my peanut candy than there is in a cream made of corn syrup entirely and coated with low-grade chocolate.

Q. Do you know what the grade is of the candy which is found in this chocolate?

A. No, I can't tell; I am not an expert on chocolates.

Q. Your estimate is a mere guess? You don't know the quality of this, but you do of your own?

A. Well, I take it that they do not put the best grade of chocolate in penny goods. That is reserved for dollar and a half chocolates, $1.50 a pound chocolates.

Q. Have your sales gone up or down during the last five years?

A. Down.

Q. Steadily?

A. Yes.

Q. So you feel you have rather a special grievance against anything which interferes with your sales?

A. Yes.

Q. Don't you know that you cannot make cream out of corn syrup?

A. Why, yes, I did know it.

Q. Why did you say what you did just now?

A. Why, you can make cream out of just enough cream to make it stand up.

Q. Well, but your response was obviously exaggerated, wasn't it?

A. Yes, if you take it that way. You can't make cream out of corn syrup.

Q. You seem to have rather a bias in this case.

MR. LANK: Don't answer the question until I have had a chance to object to it.

By MR. MOHUN:

Q. How did you happen to come into it? How did you happen to be here as a witness? I withdraw everything else.

MR. LANK: Just a moment. I object to that. It is not material how this witness happens to be here. He is here as a witness.

MR. MOHUN: I do not think that is objectionable.

EXAMINER ALVORD: Just a moment. Counsel has a right to develop any bias or prejudice that this witness may have as against the respondent. He came here, I suppose, in response to a subpœna. I don't know of any other way we could get him here.

MR. MOHUN: I do not know. I want to find out.

A. I was subpœnaed to appear.

By MR. MOHUN:

Q. Had you ever talked with anybody up here before you were subpœnaed?

A. No, sir.

Q. Whom did you talk to before you came?

MR. LANK: Just a minute. I object.

MR. MOHUN: This is not your client.

EXAMINER ALVORD: The objection is over ruled.

By MR. MOHUN:

Q. Answer the question.

A. What was the question?

Q. With whom did you talk?

A. No one. I sat here with a man here in the office, but we did not discuss the case.

Q. This is the first time you came to Washington in this case?

A. The first time; yes, sir.

Q. Didn't you talk with anybody before? You talked some time?

A. No, sir.

Q. In Richmond or otherwise, before you took the stand?

A. I have not. I have never discussed it in any way.

Q. So far as you know Mr. Lank here, who has examined you, and Mr. Rowland, so far as you personally are concerned, they didn't know what you were going to testify to; is that correct?

A. I presume they did. I wrote a letter of protest to the Commission asking them to push it when it first came up. I presume that their line of reasoning following my letter made them know I was opposed to it.

Q. When did you write your letter?

A. I think it was twelve months ago, or eighteen months ago; I can't say the date.

Q. To the Federal Trade Commission?

A. Yes, sir.

Q. And asking them to file a complaint?

A. Yes.

Q. And proceed with the prosecution?

A. Yes.

Q. Of those making draw pieces?

A. Yes.

Q. And you have had no communication with them since then?

A. Absolutely none, except a formal notice saying I would be subpœnaed to appear, and later on a letter enclosing the subpœna.

Q. Have you ever had any connection or business relations of any kind with this respondent?

A. I have sold them merchandise for years in their jobbing department, and we were very happy in every way. Mr. Keppel is a personal friend.

MR. MOHUN: That is all.

EXAMINER ALVORD: That is all, Mr. Smith.

(Witness excused.)

MR. LANK: I am going to ask Mrs. Wilcox to take the stand now, if she will, please.

CLARA B. WILCOX, was thereupon called as a witness, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Your name is Miss Wilcox?

A. Yes.

Q. And where do you live, Miss Wilcox?

A. 3632 New Hampshire Avenue.

Q. You have a business on Eleventh Street, do you?

A. 3112.

Q. I didn't quite get that.

A. 3112.

Q. And do you sell candy in that store?

A. I do.

Q. How long have you had the store?

A. Twenty-four years next month.

Q. And is that close to a school?

A. Right around the corner.

Q. Are you familiar with this general type of package here which we have, Commission's Exhibit No. 1, which is the Pocket Penny Man?

A. I haven't sold this for years. I think years ago I did sell one that had a penny in it.

Q. Miss Wilcox, I asked you if you were familiar with this type of package. I didn't ask you if you sold those particular packages. Just if you are familiar with the type of package.

A. Yes, this one.

Q. And are you familiar with the type of the package which is Commission's Exhibit 4, the 1, 2, 3 and 4 package?

A. No, not that at all.

Q. Are you familiar with the type of package which is Commission's Exhibit No. 8?

A. Yes. I have had this type. I have had a box of candy with four baseballs in it.

Q. You are familiar with that type of package?

A. Yes.

Q. And do you also in your store sell what might be termed straight penny candies?

A. Yes, sir.

Q. In comparing the sales of the two when you have one of these packages, which we may term a break package, referring to the type of package which is Commission's Exhibit No. 8, does it sell faster to the children than the straight package, or does the straight package sell faster?

A. This (indicating) sells faster.

Q. This? That is not entirely clear. You are referring to Commission's Exhibit 8, the break package?

A. The prizes sell. If I didn't have this the candy trade would drop off fully one-half. I didn't put it in at first because I had such rushes at the lunch hour, and did not think I could handle it, and when I did not I found I was losing my trade. About one-half or two-thirds of my business is the chance candy and one-third straight candy.

Q. Have there been times when you did not have draw packages on hand?

A. Yes.

Q. Have you had demands from the children that came in the store?

A. Yes. They would walk out and not buy any because I didn't have it.

Q. Could you tell from their remarks, or do you know whether they went to a store that did have the break or prize package?

A. Of course, not all of them. Some of them would take something else and some of them wouldn't; if you didn't have them they would go where they did have them.

Q. Is it at all unusual for several of the children to come in together and get quite excited in the purchase——

MR. MOHUN: Oh, that is objected to, of course.

EXAMINER ALVORD: The objection is sustained.

MR. LANK: I will kill that question.

By MR. LANK:

Q. You say you have had the store for twenty some years?

A. Yes.

Q. Can you tell or do you know whether or not the straight package has a larger piece or the value of the child's penny goes farther in the straight package, or does it go as far or farther in the break and take package?

MR. MOHUN: I object to that. It calls for a conclusion and an expression of opinion as to what this witness knows as to the value, not the sales value, but the value of candies in and of themselves. I cannot see that she is qualified to answer that question, and hence I object.

EXAMINER ALVORD: I think she can state in a general way whether the straight is larger than the prize package. That is a matter of observation and not of opinion.

MR. MOHUN: I note an exception. We are going to have a lot of them.

A. This is one of them, isn't it?

By MR. LANK:

Q. That is the penny cream according to the testimony?

A. Well, the penny cream is a little bit larger than that. It is not more than twice as large. I don't think it is twice as large as that. It is not any more than

twice if it is that. Of course, it is larger than that, but not more than twice as large. It is about as large around, and then comes up oval.

Of course, there are different kinds, different grades, larger and smaller. Of course, I refer to Necco goods, which are larger. That is a good grade of candy.

Q. Do the children who come into your store come back repeatedly in an effort to get a prize in the purchase of this type of candy, Miss Wilcox?

A. Yes. We have always had the children's trade. They come there first to our store because it is the first store there. But of course they really want a prize, and if we have not got it they are going somewhere else, and they generally come there first and keep on coming as long as we have them.

Q. But do they come back repeatedly in an effort to obtain the prize?

A. Yes, sir. Some of them don't care anything about the prize. I have seen them take it. They like to win. I have seen children who had plenty of money, you know, who get the prize and hand it over to another child. They like the game. It is the game that is the thing they like. It is the same as a game of gambling. I don't know. Anything that is fascinating they like to gamble on it.

Q. But those children would continue until they got the prize; is that your testimony?

A. Some of them would and some of them wouldn't.

MR. MOHUN: I object. That is most obviously leading.

MR. LANK: I think that is what she said, according to her testimony. I was endeavoring to verify what she said.

MR. MOHUN: Of course, we are all cheerful about it, but it is not a joke. We have got to get

the truth, and there should not be anything here but what is admissible, and I move both the question and response be stricken from the record.

EXAMINER ALVORD: I think I will suspend the ruling on that because most of the testimony I did not hear at all; when the transcript comes in you can have an opportunity to renew your motion, and I will pass on it then.

MR. LANK: I think that is all of this witness.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Miss Wallace, is that your name?

A. Wilcox.

Q. Miss Wilcox, if I understand you correctly, looking at Exhibit 1, this box, you stated that you do not handle it?

A. I haven't handled it—for many years.

Q. Wait a minute, please. But you had done so; is that not correct?

A. Yes.

Q. Looking at Exhibit 4, you stated likewise you had not handled that for many years?

A. No; I haven't handled that at all.

Q. Looking at Exhibit 8, you stated you handled a similar box, but there were, I think you said, three baseballs.

A. I think four and a box of candy instead of this (indicating). At different seasons of the year it would be different. Some of them have boxes of candy and some of them have not.

Q. That was not made by Keppel, was it?

A. I did not pay any attention to who they were made by; I don't know. I bought them from the Big Four and Zupnick; those were the two. And then the one with the egg I sold quite a number of those at Easter time.

MR. LANK: The witness pointed——

MR. MOHUN (interposing): Just a minute. I am examining this witness; you are not.

MR. LANK: The witness pointed to Exhibit No. 10 when she referred to the egg.

THE WITNESS: It has one big egg and several little ones. Of course, if others made it, I don't know whether they did or not.

By MR. MOHUN:

Q. You don't know that Exhibit 10, which has a picture of a chocolate egg, was made by Keppler Company or not?

A. No, I don't. When they come in I just try one of the small pieces of candy to see if they are all right, and when the drummer comes along I just try one, and put a penny in the box for it. If it tastes all right I never pay any attention to it.

MR. MOHUN: Mr. Lank, I move it be stipulated between counsel that the respondent has never manufactured a box of candy with the four "baseballs," which she said.

MR. LANK: She says she thinks it was four baseballs.

MR. MOHUN: The record speaks for that.

MR. LANK: Mr. Rouf, you have sold packages that had baseballs?

MR. ROUF: I think one baseball, but never with two, or never with three or four.

MR. MOHUN: Assuming it will be shown, Mr. Examiner, that the respondent has never put out a package with other than one baseball, I move that the entire testimony of this witness be stricken out on the ground that she has not shown she

knows anything about the Keppel goods, and cannot testify that she has ever handled them, and hence the testimony is obviously irrelevant and incompetent.

EXAMINER ALVORD: I am going to suspend the ruling on that motion until we can get a transcript of the testimony, because most of it I did not catch as it came in.

(Discussion off the record, after which the following occurred:)

MR. MOHUN: If your Honor please, I would like to have an exception.

I have no more questions to ask this witness.

(Witness excused.)

MR. LANK: Mr. Gelfand, will you take the stand, please?

ALBERT GELFAND, was thereupon called as a witness and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Your name is Albert Gelfand?

A. Yes, sir.

Q. Where do you live, Mr. Gelfand?

A. 3301 11th Street, Northwest.

Q. Do you have a place of business at that same address?

A. Yes, sir.

Q. Do you sell candy at that place of business?

A. Yes, sir.

Q. How long have you been in business, Mr. Gelfand?

A. Two years.

Q. Two years?

A. Yes.

Q. During that time have you ever sold any of the so-called break packages similar to what we have here?

A. I have sold chances, if that is what you mean.

Q. Then are you familiar with that type of package, referring to Commission's Exhibit 8, marked "School Days," Mr. Gelfand, or packages similar to that?

A. I have sold, practically speaking, half a dozen different kinds, but they are all similar to this.

Q. They are all similar to that, you say?

A. I haven't had exactly this one, but I have had a half a dozen similar to this one, all penny chances and five-cent chances.

Q. Do you sell any of those kind of packages at the present time?

A. Yes, sir. I have sold them until I was told not to sell them.

Q. Yes. When you had them in your store, Mr. Gelfand, did that type, did the draw type of package, or the break type of package, sell faster or slower, than what might be termed the straight penny candies?

A. Well, this particular chance candy, when it first came out, naturally sold faster than the other kind of candy, not because it was exactly gambling, but because it was a novelty, you know.

Q. You say it did sell faster than straight candy?

A. Oh, yes; it did. Gradually it wore off, just like everything else.

MR. MOHUN: Did you get those responses, Mr. Reporter?

THE REPORTER: Yes, sir.

By MR. LANK:

Q. Have the children since you ceased selling it asked you for that type of candy?

A. They have; yes, sir.

Q. Do you buy your candy from a jobber, through salesmen that come to you?

A. Well, yes, I buy pretty near from every jobber in the city.

Q. Have they attempted to sell you that type of package since you ceased to handle it?

A. Yes, they have. And when I told them that I was notified not to sell it they thought I was foolish, that everybody still sells them, and they thought I ought to sell them too.

Q. By whom were you notified not to sell them?

A. I was notified at the time when they made their drive for slot machines. I had two men in my place. One man, I think, was Brody. Of course, I had no slot machines, and they asked me if I sold penny wrappers of candy, and I told them, yes, sir, and they told me not to sell them any more. Since then I have co-operated with them and I have not sold any.

Q. Do you know whether or not you have lost any sales by reason of your refusal to sell that type of package?

A. Well, perhaps just for a while, but then they forgot all about it and bought other candy.

MR. MOHUN: I would like to ask counsel to refrain from these obviously leading questions. I do not like to interrupt the proceedings with constant objections, but you know the rule.

EXAMINER ALVORD: They are leading, but apparently so far they have been quite harmless.

MR. MOHUN: I quite agree with your Honor as far as this respondent is concerned.

MR. LANK: I have not succeeded in leading this witness then, have I?

By Mr. Lank:

Q. Are you close to or some little distance from a school, Mr. Gelfand?

A. Well, I don't have any school trade at all. It is a few blocks from the school, but there are several stores right near the school, and naturally they won't come to me.

Q. When you sold the package, when you had the package in the store, who was the principal purchaser of the candy?

A. Well, both children and grown people. I would like to correct the word "children." I meant adults, not small children, because real small children I refused to sell those chances to altogether.

Q. You refused to sell it to the small children?

A. Yes, sir.

Q. Did they express themselves as to their desire for the candy, or did they express a desire for the prize, or was there any expression as to their intentions?

A. Well, mostly they play for the prize, naturally, but I use my own judgment. If some small child comes in I try to sell them the other candy, the regular candy, because I feel if the child does not get a prize the candy will look small for the size. You know how children are. They look at quantity instead of quality.

Q. What was your reason for refusing to sell to the child?

A. Well, I figured that if a little kid comes in, four or five years old, that if he didn't win a prize and he just got a small piece of candy for a penny I thought he might feel dissatisfied, and he might take the piece of candy home and the mother would come complaining about it, you know. In a neighborhood store we have to be careful.

Q. Your straight penny candy, you say, is larger than this candy?

A. Yes, in size it is quite a bit larger.

MR. LANK: I think that is all I want to ask him.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Did you ever handle candies that were made by Keppel & Brother?

A. I will be frank with you; no, sir. I am not familiar with the names of any candy manufacturers. All I know is the names of the jobbers.

MR. MOHUN: I move that this witness' entire testimony be stricken from the record on the ground that it has not been shown he ever handled candies manufactured by Keppel & Company.

EXAMINER ALVORD: The motion is denied.

MR. MOHUN: That is all.

EXAMINER ALVORD: Is that all the witnesses you have tonight?

MR. LANK: I have one question I would like to ask Mr. Rouf.

EXAMINER ALVORD: Very well.

L. A. ROUF, was thereupon recalled as a witness, having been heretofore duly sworn, and testified further as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Rouf, calling your attention, or directing your attention to Commission's Exhibit No. 8, which I think you said was complete in the form presented, does it appear anywhere about that package, or is it possible for anybody to look at the package and ascertain who manufactures it, or who distributes it?

A. There should be a packing slip in the bottom here somewhere, put in the bottom in cases of complaint. I do not know whether it is or not. Every package is supposed to have a packing slip. I do not see this one.

Q. You do not see the one in this particular package?

A. No, not in this particular package, but every package is supposed to have a packer's slip.

Q. And if the packer's slip was in there that would be the only reference in the package at all who did manufacture it?

A. Outside of the carton it comes in. The carton bears Keppel's name all over it.

Q. Is the carton that this package of candy was contained in the carton you refer to?

A. The carton holds ten, twelve, or fourteen boxes similar to this.

Q. And in your jobbing department is it at all unusual for a retailer to buy less than a full carton?

A. Yes, sir.

Q. And in further answer to that question, this particular package can be sold to a retailer without his knowing who manufactured it?

A. Unless he would look in the bottom of each one of these boxes.

Q. And in this particular package?

A. And in this particular one which a human element has entered into, it has been missed.

MR. LANK: That is all.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. You will note, Mr. Rouf, that on Commission's Exhibit No. 1 and Commission's Exhibit No. 4 that the name R. F. Keppel & Son, Incorporated——

A. And Brother, Incorporated.

Q. And Brother, I mean, appears on it, on the end of the box, and on Commission's Exhibit No. 10, R. F. Keppel & Brother, Incorporated, appears thereon, as well as the word Keppel at the top of the page; is that correct?

A. You had one of the packing slips from this box originally, if you will recall.

MR. LANK: Yes, sir, we had one of these packing slips originally.

THE WITNESS: That is the type that belongs in every one.

By MR. MOHUN:

Q. Just one more question. Did you ever put out a type of draw package with one or more baseballs?

A. One or more?

Q. Yes.

A. We put out with one, but never with more.

MR. MOHUN: That is all.

EXAMINER ALVORD: Have you got any witnesses for tomorrow?

MR. LANK: No, sir, Mr. Examiner.

EXAMINER ALVORD: Then we will adjourn to Thursday in Baltimore on the 2d of October, at ten o'clock, and adjourn to Room 403, U. S. Customs House, Gay and Lombard Streets, Baltimore, Maryland.

(Whereupon, at 4:30 o'clock P. M., an adjournment was taken until October 2, 1930, at 10 o'clock A. M., in Baltimore, Maryland.)

Baltimore, Md., October 2, 1930.

Met pursuant to notice, 10 o'clock A. M.

Before: E. C. ALVORD, Examiner.

Appearances: J. ED. ROWLAND and HENRY C. LANK (Washington, D. C.), for the Federal Trade Commission.

BARRY MOHUN (Washington, D. C.), for the respondent.

JOHN VONEIFF, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Voneiff, your name is John Voneiff?

A. Yes, sir.

Q. And your address?

A. 1604 Harford Avenue. Do you want my business address or residence?

Q. That is the business address, 1604 Harford?

A. 1604 Harford Avenue.

Q. Baltimore?

A. Yes, sir.

MR. MOHUN: Are these other two gentlemen witnesses?

MR. LANK: Yes.

MR. MOHUN: I would like to have them excluded.

MR. LANK: I suppose that can be done without a ruling.

MR. ROWLAND: Yes, we generally do it.

(The witnesses referred to then left the room.)

By MR. LANK:

Q. Mr. Voneiff, you are connected with the Voneiff-Drayer Company?

A. Yes, sir.

Q. In what capacity?

A. President.

Q. In what business is the Voneiff-Drayer Company?

A. Manufacturers of confectioneries.

Q. What is their address?

A. 1604 Harford Avenue.

Q. Where do you live, Mr. Voneiff?

A. 1705 East Thirty-third Street.

Q. This city?

A. Yes, sir.

Q. How long has the Voneiff-Drayer Company been engaged in the manufacture of candy?

A. Nine years.

Q. How long have you been connected with the Voneiff-Drayer Company?

A. Nine years.

Q. Before that time, what occupation were you engaged in?

A. Candy jobbing business.

Q. For how long?

A. About five years.

Q. Where?

A. The last address was 918 East Biddle Street.

Q. Prior to your connection with the jobbing business, were you engaged in the candy business at all?

A. No, sir.

Q. Will you describe, please, the type of candy business in which the Voneiff-Drayer Company is engaged?

A. The manufacture of chocolate-covered cream-center candies principally. Most of our business is chocolate penny goods, five-pound bulk, and the so-called break and take package.

Q. You are a manufacturer, are you, of the break and take packages?

A. Yes, sir.

Q. To whom do you sell your goods principally?

A. Jobbers.

Q. Do you do any business with the retailers?

A. None at all. Now, I better make this point clear. Since the first of May of this year we are doing business with retailers such as Gimbel's, Hochschild-Kohn's here in Baltimore, W. T. Grant, which have their headquarters in New York—Gimbel's in Philadelphia, New York, and numerous other concerns like the People's Drug in Washington.

Q. The large retail consumers, is that?

A. Yes.

Q. Would that be a descriptive term of them?

A. I think the best way to describe them would be —well, now, there would be chain stores and syndicate stores, syndicate drug companies.

Q. I show you here box marked Commission's Exhibit No. 8, with the label on the outside, "School Days, 200's."

A. Yes.

Q. That package is supposed to contain two hundred small pieces of candy of a uniform size and shape?

A. Yes.

Q. Together with certain larger pieces of candy, and a school companion?

A. Yes.

Q. Are you familiar with that type of package, Mr. Voneiff?

A. Yes, sir.

Q. Do you sell a package similar to that?

A. No, sir. Similar in the sense of the small pieces; but not the large prize, nor the intermediate prizes. The character is the same in so far as the——

Q. What package do you sell that could be compared with that, Mr. Voneiff?

A. Why, I think all of our penny breaks and takes, they are of the same character with the exception that they have different last prizes.

Q. Will you describe in detail one of those packages, and give us the name of it.

A. Well, we have one that we call the Flange package. It has 160 of the small pieces. It has 12 bars. That, I don't know—we have 12 bars in there that are five-cent numbers. They are numbers that we sell in what we might term straight five-cent packages for five cents. In other words, they are strictly a five-cent number, and not a five-cent number as I have seen in other packages that were termed five-cent numbers, but they really in a sense were three-cent items, and the last packages was a Flange package. At one time there we had a Flange package that held, I think, six ounces of candy, and which was of a very flashy appearance, and then we ran that package for quite a while, and we had to discontinue that and go into a larger one because competitors come out with a larger one, and our smaller one was therefore backed off the board.

Q. By the last package, you mean such as goes to the purchaser of the last penny piece of goods?

A. Yes, the last package goes to the person making the last purchase.

Mr. Mohun: Judge Alvord, I desire to renew my motion to strike the testimony that was given on—what is the date?

MR. LANK: The 30th.

MR. MOHUN: On Tuesday, and similar testimony given by this witness.

(Argument followed.)

MR. MOHUN: And I move to strike such testimony given by this witness, and renew my motion in respect to testimony given by other witnesses with respect to other candies. I move to strike that testimony from the record.

EXAMINER ALVORD: The testimony so far offered by this witness is simply, I presume, leading up to something else in order to describe his own business, and what they do. The ruling will be similar on that question as it was Tuesday. We want to get as near as we can a general picture of the industry so far as it is concerned with these prize packages, or breaks, as they have been termed, and therefore the motion is overruled. All testimony relevant to the products of manufacturers of candy other than the respondent in this case will be received subject to the respondent's objection, and an exception allowed to the adverse ruling.

By MR. LANK:

Q. Mr. Voneiff, you testified as to the five-cent numbers in that assortment of yours. What disposition was made of them, or what method was provided for the distribution of those five-cent numbers?

A. In the 160—I am speaking of our own package—160 small pieces which sell for a penny, and by no means contained a penny's worth, there are to the best of my knowledge in the package we are putting out now, there are fourteen pink centers, and the purchaser that happens to be lucky enough—I say luck, because that is what it is, it is strictly a gambling pack-

age, that they get a bar, one of these five-cent bars when they get those pink centers.

Q. The majority of the candies are what color centers, Mr. Voneiff?

A. The majority are white centers. Of the 160, 146 would be white and 14 would be pink, if the count of 14 is correct, and which I think it is.

Q. What does the purchaser of one of the pieces of candy having a white center obtain for his money?

A. You mean the value of the piece that he gets for a penny?

Q. Well, yes.

A. He puts his penny up, and if he gets a white center, he gets, I would say, less than a half-cent's worth for his penny.

Q. But one piece of candy is all he gets?

A. One piece of candy is all he gets.

Q. And you say the value of that is what?

A. I would say less than half a cent.

Q. The purchaser of a piece of candy, who, to use your words, is lucky enough to get a pink center, what does he obtain for his money?

A. He gets a five-cent bar, truly a five-cent bar if he gets our package.

Q. That is in addition to the cream candy?

A. That is in addition to the small piece.

Q. And the purchaser of the last chocolate-covered cream in the assortment, according to your testimony, obtains that piece of candy, and that last prize?

A. That piece of candy and the last prize, and if he should happen to be lucky enough to get a pink center with the last purchase, he would get a bar, the small piece of candy and the prize package.

Q. You say the Voneiff-Drayer Company has been engaged in business for nine years?

A. Yes, sir.

Q. And has there been any time during that nine years when they did not manufacture and distribute what might be termed—what you term a break package?

A. Yes, absolutely. It seems to me to the best of my knowledge that we went along about three years, not making that type of package. Then when that type of package come on the market, which naturally was competitive to us, when we made a similar package. We continued that package for a while, and then there was pressure brought to bear by the National Confectioners Association in this respect, that it seemed to me they requested that we stop, or they would report us to the Federal Trade Commission, and they stated in their correspondence that it was a gambling package, and that the industry, they representing the greater proportion of the industry—I mean the association—were anxious to have this type of package abolished, and they were taking steps to help to eliminate it along their method. Well, when we received that notice, why, we stopped. I think we stopped—it may have been six months, it may have been a year. Then a howl was set up by our salesmen that they could not get the business, the volume of business that they were getting, or rather the volume of business on staple articles with this gambling package being featured by competitors, and which was in demand probably by the consumer, which is ninety-nine times out of a 100 a child. Then, we have correspondence to prove that I am correct, which I do not have, but Mr. Parker Jones, as I say, one of our salesmen, in which he writes in and says unless he gets a package of that sort that he really could not afford to travel the state in which he was working, and which at that time was part or all of the State of Pennsylvania; and his sales showed a very material decrease, due to this gambling package being on the market. So, in order

to bring his income up, as well as our own, and get that volume back, why, we started up again.

Q. When he lost business, did you lose business?

A. He lost business and so did we.

Q. How long ago, Mr. Voneiff—do you know about when you started up, started to redistribute these packages?

A. It seems to me that was in 1924; not later than 1925. Now, following that, if I am permitted to go on with the story, as this is refreshing my mind at this time, we continued that package for, I would say two years, or not that particular package, but a package of the gambling nature, for about two years; and then in '27 the association got busy again, and we stopped for a short period, and we just had a duplication of what we had in '24 and '25; so then we started up again; and in each case we were forced to put this package out to maintain the volume of business that we had of staple articles with the staple articles that are competitive—competition with the competitor is very largely based on the quality of one over the other. The staple articles, such as, we will say, chocolate mints that sell for a penny, one piece, and all purchases are of a penny's amount, in so far as the consumer is concerned, and that being the case, the consumer has the privilege of taking the biggest piece and the best piece that he can get for a penny. That leaves us in competition with the other fellow strictly on the size and quality basis. That, however, is not the case in these gambling packages, because I know and can prove and have proven to Mr. Anderson of the Federal Trade Commission in a number of exhibits that I took there, which, if my memory serves me correct, I took over there seventy-one exhibits at one time after they had issued a stipulation to us, and we refused to sign it, on the basis that there was nothing to be gained in stopping us and allowing every one else to

go on with them, that we were absolutely against this type of package and we wanted it discontinued, but if our cutting this package out would clear up the situation generally, why, we would be very glad to step right out of the picture. But they simply boxed our sales up into the competitors that make that type of package, and on that basis we refused to sign the stipulation, and therefore we are in litigation with the Government on that package. We are one of seventy-five or a hundred that probably have received a stipulation as well as we. In this break and take package the competition in so far as quality to a great extent is eliminated, because some manufacturers lessen the quality of the candy that is supposed to be consumed to feature a prize package which is not consumed.

MR. MOHUN: I think this witness ought to be cautioned to testify only what he knows of his own knowledge.

THE WITNESS: I am speaking of what I do know of my own knowledge, sir. I am not making this story up. I am telling the facts as I know them.

MR. MOHUN: I am not saying you are making any story up.

THE WITNESS: I am not making it up.

MR. MOHUN: You will pardon me to let me finish my question. How do you know?

THE WITNESS: I do know.

MR. MOHUN: Do you know as a matter of fact, of your own knowledge that other manufacturers of these break pieces reduced the quality of the goods?

THE WITNESS: Yes.

MR. MOHUN: How do you know it?

THE WITNESS: I compared it with the quality of others.

MR. MOHUN: How did you compare it?

THE WITNESS: In being a candy manufacturer and knowing the candy, the quality of candy, I feel that I was very capable of making a comparison.

MR. MOHUN: No chemical analysis or anything of that sort.

THE WITNESS: It is not necessary.

MR. LANK: Have you finished with your objection, Mr. Mohun?

MR. MOHUN: Yes.

By MR. LANK:

Q. Mr. Voneiff, have you or have you not, during the last year or so, made a study or an inquiry into this business throughout the eastern part of the United States?

MR. MOHUN: Any one can see that his answer is going to involve things that he was told, so I object to his answering it.

EXAMINER ALVORD: The objection is overruled. Let us see what the next question is.

THE WITNESS: Will you repeat that again, Mr. Lank?

By MR. LANK:

Q. Have you, during the past year or so, made an investigation into the break and take package industry in the eastern part of the United States in relation with its effect on the business?

A. Only in so far as our own business is concerned. I think I have already stated, or rather my investigation or analysis, whatever you might call it—

or my opinion in that respect is that the package is a very poor package to put out to the consumer, which I have already stated is, and I think I am not exaggerating when I say 99 per cent. of 100 purchasers would be minors, and I think the effect of that type of package is wrong. I think it is wrong for any industry to have a gambling type of package out to further instill the gambling spirit in our children. I had, if I am permitted to bring in an occasion, that I had home with my own boys, showing you the effect of this package. There is a store across the street from us had one of our packages and another manufacturer's package, and they very nicely told me that they preferred the other fellow's package, because they figured the last prize was better. And I said, "Well, you get five cents a day. How much of this do you spend on prizes?" He said, "It don't take long to get rid of a nickel on those prizes." Well, I said, "How lucky are you?" He said, "Well, we have spent twenty cents and we have not got a bar yet." I said, "What is your plan?" "Well," he says, "if we keep on, we might get something."

MR. MOHUN: This is so manifestly hearsay, I renew the motion to strike.

(Argument followed.)

EXAMINER ALVORD: As a general proposition, I would say that that testimony was incompetent, but it may have some bearing on the question of competition. Objection overruled.

MR. MOHUN: You will allow me an exception.

MR. LANK: I think I will show the competition by the next question.

By MR. LANK:

Q. Mr. Voneiff, did the boys to whom you have reference make any reference to the quality of the penny piece which they were purchasing?

MR. MORUN: I renew the objection.

EXAMINER ALVORD: The objection is sustained.

By MR. LANE:

Q. What is your reason, Mr. Voneiff, for objecting to this form of package?

A. One reason is that it is a gambling package, and I do not like very much to put out that type of candy because it is a gambling package. Second, the purchases are uneven, and third, it is a type of package that the quality of candy can be depreciated, and overlooked by the consumer because of this gambling spirit. They are more interested in the prize than they are the quality of the candy. I have actually seen children buy as much as twenty cents worth of these things and they would take this small piece and just break it open and if it is a white center throw it away, and keep on until they want something, which to my mind proves they are interested in the prize and not the candy.

Q. Do you know whether or not this package when it is sold by the retailer is contrary to the law of the place where it is sold, Mr. Voneiff?

A. To the best of my knowledge, I think there is only one State in the Union that does not have a law that prohibits the sale of this package, and that is either in Texas or New Mexico. I am pretty sure every State in the Union has a law, excepting that one, whichever it may be, that prohibits the sale of this type of package.

Q. There is one thing I forgot to ask you earlier in your examination. Where do you sell your candy, Mr. Voneiff?

A. We sell it from—well, I think it is safe to say from Maine to Florida and as far west as the Mississippi River. We have had some packages to go to California, I believe.

Q. They are shipped from Baltimore, are they?

A. From Baltimore.

Q. To those States?

A. To those States.

Q. Do you in your package that is similar in scheme to the Commission's Exhibit No. 8, which is marked "School Days," include a card similar in any respect to that which I am handing you, Commission's Exhibit No. 9? (Handing card to witness.)

A. When we first started out our cards were very explicit. They did not state that the small pieces were a penny, nor that the five-cent pieces were a penny and that the last prize was a penny. They simply stated one cent—I do not know whether I can just quote literally what was on that card, but the substance of the card was that every purchase was a cent, and that the purchase of the small pieces were a penny and the rest were prizes. Later on when they started to bring in these packages I was informed by one manufacturer that my cards read wrong, that the way to evade the possibility of being called in by the Federal Trade Commission was to make a card similar to this, that everything was a penny. And the purpose of rearranging that card was absolutely, as I see it, to put prices on every package, and in a sense go around the bush to evade the real purpose of the package, which was the prize feature, and I was told that if we lined them all up, one piece for a cent, that the Government would have a job going around that phase of it.

Q. And at the present time, you do put a card in each package?

A. A card in each package, and almost identical with this card here.

MR. LANK: When the witness said with this card here, he was referring to Commission's Exhibit No. 9.

By MR. LANK:

Q. I show you a package which is marked "Commission's Exhibit No. 1," and ask you if you can look at that package and tell me whether or not you put out a package which in any way is similar to that package (handing package to witness)?

A. Why, we put out a package like that. I think back in '21 or '22 we wrote to the Department of Agriculture and told them we wanted to put pennies in what we termed a piece called "Penny Cop," and we wanted to know how we could insert this penny and still be within the law so far as the penny might affect some law relative to a piece of metal or copper inside of that candy, and I have been looking for the letter that we received from the Department of Agriculture in which they stated to sterilize the penny, wrap it in wax paper, and we could put it inside of the piece of candy. And then last year we got a letter from the Department of Agriculture here in Baltimore to discontinue the piece on the basis that it had a mineral inside of it, that this penny was a mineral in a sense, but after all not as rated in the book in which they had the law outlined in it. So I went down to Mr. Walsh and said, "Here, we are just going to cut this piece out." And we did. This type of candy has come into our markets every place that we do business, and still comes in; and only yesterday I signed a letter that I sent to Mr. Walsh and told him we were going to retract our position of September, 1929, and on this day we were going to start to put pennies in this piece, and told him it was for competitive reasons, that it was unfair for us to stop and have our competitors to come in with them. It not only affects the sale so far as we are concerned of that particular type of candy, but this is what happens: There is a demand for that type of candy. We do not have it, and the other fellow does. He calls on a jobber and he says, "I

want a case of Penny Cops." We will assume they are Cops. And he says, "Well, what else are you going to buy?" "Well, that is all I want." And he says, "It is not fair to buy your Cops from me with pennies in them and not buy something else." And he uses that argument and gets other business as a result of having a gambling package that we do not, and he carries business from us on staple articles as a result of what I just said, and only yesterday I sent that letter to Mr. Walsh, and we are starting today to put pennies in them.

Q. Does the sale of these draw packages affect your sale of staple goods?

A. Absolutely, absolutely.

Q. And that is the matter you have just recited?

A. Yes, sir.

Q. In that package, when you did manufacture it, did you include a display card similar in any respect to Commission's Exhibit No. 2?

A. To the best of my knowledge, no. I think the only card we had in there was "Cops, a penny apiece." But we did tell the jobber that they had pennies in them. We put five pennies into that box. I had a box of this nature and opened up 120 pieces and found two pennies in it. So there is a three-cent advantage over us, and one of the methods by which the consumer can be misled, because there is nothing in the box that states how many pennies are in them. I do not know whether our competitors tell the jobbers how many they have in them, but we do. We guarantee five pennies in a box, and if we put five in and the other fellow puts two, there is another example of where it is unfair competition, on the basis that you do not have to tell the public what is in them.

Q. I call your attention now to Commission's Exhibit No. 4, which is marked on the end, "1, 2, 3 Big

Chiefs, 60's." Have you at any time distributed a package that would correspond to that package?

A. Yes, we have. I have for the last two or three years, and still do. This package come out. We are not the originators of the "1, 2, 3" package, which we term it. This package come out, and for a while it broke int othe sale of the penny break and take, where the 160 or 150 small pieces were concerned; and we have records to show a substantial drop in the penny break and take; and our salesmen, and again I have correspondence to prove that, requested us to make that type of package, and we did, and it immediatelly brought our sales to a par with the sales of gambling packages—another instance of where competition forced us to make this type or to be satisfied to lose that volume of business.

Q. I call your attention to Commission's Exhibit No. 5, which is a card describing this package, and ask you if you did include or do include a card in any respect similar to that in your "1, 2, 3" package (handing card to witness)?

A. Yes, I am pretty sure we do.

Q. I call your attention to the last line of that card, which reads, "Mr. Dealer, display this sales getter in end of box and watch this quality candy go." Does your card have a line similar to that?

A. No, sir.

Q. The card which you do include in your package is included for what purpose, Mr. Voneiff?

A. To acquaint the consumer with what there is in there to be purchased, with what there is to be purchased and how. What they really get for their penny is the story.

Q. You say the consumer, Mr. Voneiff. Do you mean your purchaser or the ultimate consumer?

A. The ultimate consumer. Not our purchaser, no, because our purchaser gets this box. The only in-

formation he gets relative to the contents of the box is what the salesman gives him at the time he is making the sale to the jobber. Our packages are tied and they are distributed to the jobber, and he, in all probabilities, will open up that package and carry the contents of it, and principally the card, which he will carry to the retailer to show the retailer what the contents of the box is.

MR. MOHUN: I move that that part of the answer be stricken where he refers to what the retailer may do, or what he might or might not do.

EXAMINER ALVORD: Motion granted.

By MR. LANK:

Q. Mr. Voneiff, you say you were in the jobbing business at one time?

A. Yes, sir.

Q. When you were in the jobbing business, did you handle packages similar to these in question?

A. The only type of package of this type that I think that was on the market at the time I was in the jobbing business was the pieces with the pennies in them, and there was several types of those. I do not believe there were breaks and takes on the market at that time. I do not remember handling a package of that type which was prior to 1921.

Q. When you were a jobber and handling those packages, what did you do with the package when you received it from the manufacturer?

A. At the time I was in the jobbing business we sold right off the truck and we simply opened up the full package, and if we had a package like the pieces with the pennies in them, why, we would tell it to the retailer, "Here is a package that has pennies in it, so many pennies in that box," and in most cases they sold on that basis.

Q. Did you or did you not resell the package in the same shape that you received it?

A. Yes.

Q. Do you know whether that is the custom in the jobbing trade?

A. I am pretty sure it is. It may not be sold that way, because some jobbers have salesmen that travel with samples, sample trays and cases, and others sell right off of the truck. Now, where they are sold off of the truck, usually they display the package as it is received from the manufacturer to the retailer; but where the salesman carries a sample case, why, he will probably carry a display card or carry a piece cut in half, showing the penny inserted therein.

Q. I show you Commission's Exhibit No. 10, which appears to be an advertisement of Keppel's Egg assortment, and ask you if you have ever seen any cards or advertisements similar to that (handing paper to witness).

A. I have seen any number of advertisements like that that have come to me direct. The fact that I was in the jobbing business, some of the manufacturers are still sending me circulars, and we have received a number of specimens like that.

Q. Have you furnished similar advertisements to your salesmen?

A. We do not furnish advertisements of that sort. What we do is—something I probably should have said before, was another method of the jobber's salesman selling this item is that he could not very well carry a whole box like that, especially if he has got eight or ten items to sell, so we take a package and have the picture taken of it and furnish the picture on a postcard, and we carry that to sell to the retailer instead of the original packages. That is the type we put out, but we did not circularize the trade with this type of advertisement.

Q. There was another thing I overlooked to ask you at the time, Mr. Voneiff. In taking first Commission's Exhibit No. 8, the School Day package, which we might term the pink center package——

A. Yes.

Q. Is there any way the ultimate consumer in looking at the package and in selecting the piece that he purchases, can determine the color of the center?

A. It happened occasionally that in the covering of these pieces that the coatings on those pieces are so thin that the center will appear through, and they have caused a lot of grief for the retailer because they are picked out, and the prizes are out, and it leaves the package with a lot of these small pieces, and no prizes, and therefore the retailer is stuck.

MR. MOHUN: This response is clearly hearsay.

EXAMINER ALVORD: I think so.

MR. MOHUN: I move that it be stricken.

EXAMINER ALVORD: Motion granted.

THE WITNESS: Your Honor, if I am permitted to say, this is not hearsay with me, this is actual facts and actual experience.

MR. MOHUN: The witness is not a retailer; he has so stated.

THE WITNESS: But my investigation and interest in this package brings me up to this point, because we have a stipulation, and expect to answer these questions, and therefore I made the investigation, and what I tell you are actual facts and not hearsays.

EXAMINER ALVORD: On that basis, then, the motion is overruled.

MR. MOHUN: Exception.

By MR. LANK:

Q. In manufacturing those pieces, is it your purpose to make it possible to determine the center or——

A. No.

Q. Or is it your purpose to make it impossible to determine the center.

THE WITNESS: Mr. Commissioner, if you will pardon the interruption, I would like to verify my statement in that respect. This is an occurrence in our own plant. We have very often, have records to show where these packages have been returned because they were not properly covered by us, and that the centers were visible through the chocolate, and that the very thing I just told you are actual facts with the Voneiff-Dreyer Company in their own package.

MR. MOHUN: They are immaterial, anyhow.

THE WITNESS: There is another thing that the consumers do. This type of package is leading up to a lot of trickery with the children. If the package is displayed in an open space, they will, if they can get by with it, run their finger nail in there and expose the center. We used a very definite way of packing. We put a piece in each corner and one in the center. And we had to stop that because the kids in time were accustomed to the corner they were found in, and they picked them out. Those are actual facts, your Honor.

MR. LANK: Will you repeat my question, please?

(Question read by the reporter.)

THE WITNESS: It is our purpose to make it impossible to determine the center.

By MR. LANK:

Q. Now, directing your attention to the 1, 2, 3 package, which is Commission's Exhibit No. 4, what is the method used in the sale of that package, Mr. Voneiff?

A. The method in the sale of that package is, there are so many 1's, 2's and 3's in the box—I just forget the proportions of them—a slip of paper is wrapped on the inside, and they come out and pick one out. There are so many in there that they pay a penny for and so many in there that they pay two cents for, and so many in there that they pay three cents for. The method is that the price of the piece is on the inside. Now, so far as the consumer is concerned, he has no way of determining what price it is. He picks it out, and whatever the price is he pays. If he is lucky, he pays one cent, and if he is unlucky he pays two cents or three cents. We had to make a 1, 2, 3, 4, 5, that they would sell according to the price that was in there or rather they normally had a definite price of a cent, and we had so many in there, that if they picked out that number, why, they would not pay for that, they would get another chance free.

Q. Are those pieces in the 1, 2, 3 and the 1, 2, 3, 4, 5 package generally wrapped candies or unwrapped candies?

A. Generally wrapped.

Q. I show you Commission's Exhibit No. 6, and call your attention to the 1-cent, 2-cent and 3-cent tickets at the bottom of that exhibit. (Handing exhibit to witness.) Is that the form that you used?

A. Practically the same form.

Q. By that you mean you put cards or tickets or slips similar to this in your packages?

A. Similar to that, inside the wrapper.

Q. Are those tickets displayed when the package is displayed for purchase by the ultimate consumer?

A. No. If they were displayed, it would eliminate the gambling feature.

Q. Mr. Voneiff, how much, or what proportion of your manufacturing business is represented by the so-called break packages, and what proportion is represented by the so-called straight or staple goods?

A. I would say three years ago it represented 15 per cent. of our total business.

Q. That is, the break packages?

A. The break package. But it is getting less in latter years. It has just stepped right down. I suppose in 1930 it will probably represent somewhere between 5 and 8 per cent.

Q. Comparing your business when you put out the package and then when you stopped putting out the so-called draw package and when you started to put it out again, could you see a difference in the amount of staple goods that you were able to sell?

A. Our staple business was not increased after we discontinued the package. I would like to cite a very definite result of stopping that package. I think it was in '27 that one of our salesmen in West Virginia had a very substantial falling off in sales one year over the other. And there was not any analysis made in the office to show what items it was that he was losing this business on. I want to refer back a little. We put out a break and take that had a litle four-ounce package as the last prize at that time, and then the half-pound flange come in, and we made them for a while, and then when I checked up on my costs, I found out we were just as well off without the sale of that package, of the half pound flange, with the prices raw materials were at that time, we were just as well off without it as we were with it, and we discontinued that package, and the only cost was the package that showed us our legitimate profit. Well, then, this time goes on and the comparison of sales for this particular man shows a substantial decrease and I made a trip with this man to find out why his sales fell off on this particular terri-

tory. I met this man at Johnson City, Tennessee, and worked with him from there clear back. Our last stop was in Fredericksburg, Virginia, I think. I find that as a result of taking this break and take package away from him that had the half-pound flange as last prize that his sales decrease represented the loss of sales on that package. That is how it affected that man, and that is how it affected the concern as well. Now, that is an examination and investigation that I made myself.

EXAMINER ALVORD: I would like to ask a question right here. If I understand you, you said one time along in '24 or '25, at the instance of the Confectioners' Association you discontinued putting out a prize or gambling package?

THE WITNESS: Yes.

EXAMINER ALVORD: Are you prepared to tell us to what extent the discontinuance of that prize or gambling package affected the sales of your staple goods?

THE WITNESS: When the package was discontinued there was—or rather in that same year we increased our sales, which was our increase in sales, our tonnage sales, without an analysis of that increase, which would show that as a result of discontinuing that package our sales still went on, but that increase in sales was due to taking on new territories. I would like to come back to the State of Pennsylvania, the State that this particular man was working, and the man that was most affected by the discontinuing of this package, as I think I said before, that Mr. Parker Jones holds the correspondence from this salesman showing or telling he could not afford to make the trip unless we gave him a break and take package. Now, that naturally decreased our sales in that territory, and they were

not—the loss of sales on that package was not taken up by sales, increased sales in staples.

EXAMINER ALVORD: Could you roughly give us an estimate of your loss in staple goods during that period?

THE WITNESS: It would be kind of hard for me to segregate the loss of sales, for the reason I just told you, that we took on other territories, and our sales—we showed a very substantial increase in our general business; but I can say this, that the sales of this particular man, which I have the correspondence—the other men are not quite—they did not take the matter up with me like this fellow did. He wrote and told me point blank that you give me prizes or I cannot make the trips, cannot afford to make them. And when he had the packages he had a substantial income. I do not know what it was; I could not remember that. I can get the figures. But I think it is safe to say that his income was reduced to at least 30 to 40 per cent. as a result of not having the packages, as a result of taking the packages away from him.

EXAMINER ALVORD: That is all.

By MR. LANK:

Q. I do not know whether I clearly understood your answer at this time or whether I clearly understood it a minute ago when you said the losses were represented by the loss of sales of these draw packages. By that do you mean to say that he still sold his staple goods, but did not sell his draw packages, or do you mean to say that his sale of staple goods fell off, or just what do you mean by saying that?

A. His sale of staple goods, to the best of my knowledge, held their own one year over the other, but his total business decreased as a result of not having the prize package, and over the period he did have them.

Q. You say that you have twice for short periods ceased to put out the so-called draw packages, and you say you are opposed to putting them out. Will you give us your reasons for again putting them out, or for putting them out at all when you are opposed to them?

A. We ceased, as I said, and then started up again, to hold up the volume of sales with the particular man affected. Now, we would not make up a prize package, again make them and give them to a particular man that had fell off as a result of not having the package in a particular territory. If we make a package, we give it to all. But I think it is safe to say in all our territories we suffered a loss of business because we cut them out. I am sure I can prove that by records in our office. But I again want to say that our increase in sales might change the aspect of that thing. But when it is noticed we had lost business when we did not have prizes, and when we do have prizes for the time we do have them. There is one other thing I would like to say if I am permitted. I stated that our sales of breaks and takes this year would be 5 per cent. of the total, 5 to 8 per cent. of the total instead of fifteen. Well, that is due to our concerted action in other channels of outlets of candy. In other words, this is the first year—since the first of May is the first time that we started selling syndicate stores, like the Peoples and Economical Drug and those people. Now, we do not solicit them on prize packages at all. When we increase that business we decrease our percentage of prizes against the total.

Q. Are you a member, Mr. Voneiff, of the Confectioners' and Ice Cream Manufacturers' Protective Association?

A. No, sir.

MR. ROWLAND: I have a few questions I would like to ask Mr. Voneiff.

By MR. ROWLAND:

Q. This break and take package is usually in penny goods, isn't it, Mr. Voneiff?

A. Usually, yes.

Q. Now, you put out penny goods besides the break and take package?

A. Yes.

Q. Then, in addition to those two, you also put out other types of candy, don't you?

A. Yes.

Q. What proportion of your business is other types of candy as distinguished from the penny goods?

A. Why, I would say our other types of candy, with the exception of this year—I am not including this year, because we have made a change there in our method of—or, rather, selling new outlets. But I would say in years prior to this year that our penny goods would represent 60 per cent. of our business, and the other forty would be divided between Christmas items, like five-pound assorted and half-pounds and one-pound assortments. Twenty-five per cent., approximately 25 per cent., would represent that type, and the other fifteen would represent the break and take.

Q. Well, then, the 60 per cent. is straight penny goods?

A. Straight penny goods.

Q. I see.

A. I would like to qualify that by saying penny goods and five-cent numbers, five-cent bars. Let me put it this way, if you will: I would say that 55 per cent. would be penny goods, 5 per cent. five-cent numbers, and 25 per cent. the Christmas numbers and the 15 per cent. breaks and takes.

Q. I see. The five-cent numbers, they are not a prize package?

A. No, sir.

Q. The comparison as between your business with the break and take business would probably be with the other penny goods, wouldn't it?

A. Yes, sir.

Q. And only 15 per cent. of your penny goods is break and take, and about 55 per cent. is straight?

A. Yes.

Q. How many types of break and take packages do you manufacture?

A. At this time I think we have two.

Q. And those are the different colored centers, and what is the other?

A. Let me get my memorandum on that. We have the 1-2-3. You see, we do not classify that as break and take. The break and take we have at the present time, we have the 1-2-3. That is all we have at the present time.

Q. And any other package or lottery package, or anything of that sort?

A. Yes, we put out a package that has the gambling spirit in it, but to my mind it reaches the adults rather than the children, and that is your punchboard arrangement.

Q. You sell a punchboard?

A. We sell those, yes.

Q. And that is a board with little holes punched out and the prizes in candy?

A. Yes.

Q. Is that correct?

A. Yes.

Q. How long have you been making that?

A. We have been making that since the first of May.

Q. Now, taking the straight penny goods that you sell, and the break and take penny goods, compare for the record, if you will, the quality or size, or, in other

words, the value that the ultimate consumer gets as between those two packages of goods?

A. So far as the quality is concerned with Voneiff-Drayer, one package over the other, they are all right. We make no distinction on quality. In other words, if we run—for an example, if we should happen to have a prize that would have a cocoanut cream bar in it, the same quality bar, the same batch—or, rather, I will put it this way: There will be part of that batch would go into breaks and takes and part of it would go into the regular five-cent bar. There is absolutely no separation in our plant in so far as quality is concerned. There is no separation in our plant in so far as the size of the bar is concerned.

Q. Well, those are prizes you are speaking of now?

A. Those are prizes, yes.

Q. I want you to compare——

A. But really the pieces——

Q. What they pay the penny for.

A. The penny piece has the same quality as the penny items would have, but they do not carry the same size.

Q. And what difference would there be in size, just approximately?

A. I would say that the small pieces in the breaks and takes that sell for a penny are anywheres from 50 to 60 per cent. smaller than a penny staple item.

Q. And when you pack those in your packages, are they the same number in the straight penny piece as they are in the break and take?

A. No, they vary. In our case they do not. We make 160 count, which would be 160 pieces in there instead of 120. But the price is different on the 120 count staple items. That package would sell for sixty cents.

On the 160 count break and take that item would sell for eighty cents.

Q. Just take as a unit, say, the weight. I do not know what else to take, as between the 120 staple and the 160 break and take, would there be about the same amount of candy in the penny pieces, although one had eighty more pieces in it, or forty more.

A. The weight of candy in a prize package is usually—in other words, if you put a prize in a package, that, we will say, one prize will cost twenty cents and another prize will cost thirty cents; if you make them two packages, and you have a twenty-cent last prize and a thirty-cent last prize, and the count is the same—they are both 160 count—then the 160-count package with a last prize that will cost thirty cents will have less candy in it, pounds of candy than the package of 160 count selling for the same price that has a twenty-cent prize in it, and to my mind that is one of the points that make it a kind that is hard to meet, because the quality of candy, I think, can be determined more readily by the consumer than the quality of the last prize, because you can take a last prize, and if it happens to be a rag doll this large (indicating), the eye appeal will probably appeal to that large prize, and it may be a twenty-cent last prize instead of a thirty-cent last prize, and the thirty-cent prize might be some little pencil or something like that. It might have a thirty-cent value in it, but the very size of the thing does not appeal as the big rag doll would, and therefore the consumer to my mind is making this purchase on the basis of the last prize rather than on the quality of the candy.

Q. Let us take that same analogy with your staple goods; that is, 120 penny pieces in the box?

A. That is 120, yes.

Q. And the break and take has 160?

A. Yes.

Q. And referring to the candy in those two, is there more candy in the 120 pieces of staple than in the 160 pieces of break and take?

A. Absolutely.

Q. And it sells for the same price to the retailer? I mean the ultimate purchaser?

A. Absolutely, it sells for the same price. And, as I have already stated, the size of the small piece to the consumer would be anywhere from 50 to 60 per cent. less in the penny prize than it would in the penny staple piece.

Q. So the ultimate consumer gets more value for the straight penny piece than he does for the prize penny piece?

A. Yes, for that particular sale, yes.

Q. Assuming he pays a penny for a piece of candy?

A. If he goes into a store with two pennies and one penny is for a penny staple mint, and the other penny is for a break and take, and he don't get a prize, why, he has got a whole lot less for his money than he has on the staple item.

Q. Now, so far as your return is concerned, does the manufacturer make more money by selling the break and take package, or by selling the staple package?

A. Our returns are the same on every package that we make. There is a possibility of depreciating your quality and getting an extra percentage of profit, if you want to run it that way, but we do not. I have already stated we have one quality of candy for everything. I might state we aim to earn 10 per cent. on a dollar's worth of business, and that 10 per cent. applies to every dollar's business in the place regardless of what type of package.

Q. But in preparing your break and take package, in order to realize your 10 per cent., you have to include in the package the value of the prizes, don't you?

A. Absolutely.

Q. So that the value of the penny piece of candy has to be less?

A. The value of the small piece, absolutely, less. But the net profit on the unit, if it is an eighty-cent unit, we aim to earn eight cents, regardless of what the last prize is. As I stated before, if we decided to put a last prize in there for a quarter, it cost us a quarter, assuming that the counts are the same, and heretofore we have been putting one in there that cost us fifteen cents, we are going to take ten cents' worth of candy out of there to make up the extra ten cents that we have in this new prize.

Q. Does that same percentage of profit, as we might say, follow down—does the jobber in your goods, get about the same range or profit between the two articles?

A. The jobber works, I believe, pretty nearly on the same basis.

Q. Is your company a member of the National Confectioners' Association?

A. Yes, sir.

Q. At present?

A. Yes.

Q. How long have you been so?

A. I believe we joined it in '22.

Q. Are you or any members of your company, any of the officers of your company, officers in that Confectioners' Association?

A. I was up until June of this year.

Q. For how long a period?

A. For three years.

Q. What was your position?

A. On the executive committee of the National Confectioners' Association.

Q. Now, you stated that the association objected to this type of package and attempted to stop it?

A. Yes.

Q. Was that while you were an officer on the executive committee?

A. That was prior to my time. Let me see, '30, '29, '28—the year I went in, in '28, and I served the years '28, '29 and '30, and these activities were in '27, I think.

Q. But your company was a member at the time?

A. Yes, sir.

Q. Do you know what reason the association assigned for objecting to this type of package and attempting to stop it?

A. I believe I do. I think the reason for the pressure brought by the association, or rather their activities was brought, due to the pressure of the members of that association that objected to this type of package, basing it as an unfair competitive piece.

Q. Do you know any of the reasons they assigned for its being an unfair competitive piece?

A. Practically the same reasons I have stated in my testimony right here.

Q. Now, you stated that you had made something of a study of this general situation with reference to break and take?

A. Yes.

Q. In your study did you examine the packages, break and take packages of other manufacturers?

A. I have had the different types of packages brought in by our salesmen, and commented on the quality of the candy. At the time that I took the—I think it was seventy-one exhibits—to Mr. Anderson in Washington, I took the packages and opened them up and broke them; and in one package I asked him, I said, "Now, you eat it." He put it in his mouth and spit it out. There was another package there, of a one-two-three type, that I would say was not fit to eat at all, because it was—in the first place this particular piece was not covered as well as a staple article would be. The quality of candy to a great extent, cream center candy or any other kind of candy that is chocolate covered, to a great extent the quality depends on

the quality of coating around it and the amount. As a comparison, if you take a wall and put a good coat of paint on it, you have got a good-looking wall, and which, if you thin it out you have a smeared up wall. And that was what was in this particular case. In order to get the size into this piece and in order to absorb the cost of the last prize, the quality in this particular piece was absolutely waived to meet these other conditions.

Q. Did you find in that general survey of the field that you made that the same condition to which you have testified as obtained to your business held good with the other manufacturers, that is, they generally in their staple packages put better or larger pieces of candy or better quality than they did in the break and take penny piece?

A. Not generally, no. I have examined packages by concerns that contained a wonderful quality of candy, the same quality that they sold in their regular staple packages. I have examined candy that was by no means near the quality of the candy that these manufacturers made in their staple lines.

Q. Have you ever examined any where the break and take penny piece was as large, quality being the same as the staple piece?

A. I do not know of a single instance of where the break and take piece was ever as large as the staple piece. I would like to say this, that I have seen packages, actually seen them broken with my own hands, where, in order to get the piece as large as the staple article, as a penny staple cream piece would be, they used marshmallow, which gives you a larger body, more volume, and looks as large as a cream piece, but is not, and that is just as much of a—or, rather, a piece of marshmallow the same size as a penny piece of cream would be about worth half of what the cream piece would be.

Q. In cost you mean?

A. In cost, yes, sir.

Q. So then, from your knowledge of the business, both in your own business and in your survey of this general field, would you say that it held true throughout that the penny piece of staple goods is larger and better value to the ultimate consumer than the penny piece of break and take?

A. I absolutely do.

Q. These chain stores and syndicate stores, do you sell your break and take packages to them?

A. No.

Q. They handle staple?

A. We sell them pound packages, goods with no gambling feature, straight staple merchandise.

Q. This penny package, who does that go to? Who is the class of customers who buys that ultimately?

A. Children.

Q. It is a children's package primarily?

A. Primarily.

Q. Made for that purpose?

A. I would say yes. The Voneiff-Drayer Company makes it to appeal to the children.

Q. As a matter of fact, penny candy would be for children buying it?

A. That type of package, I have already stated, and I think I am not exaggerating when I say 99 per cent. of the purchasers are minors.

Q. Is there a big demand for the break and take candy?

A. There was. I really do not know what it is, because there is a tremendous amount of these packages out now.

Q. Your own business, however, has dropped, you stated?

A. It has dropped, yes, sir. It has dropped for this reason: We do not create those new packages to meet

the number of new packages that are out. Their counts differ from 150 count clear up to 300 count, and all that sort of thing. We do not meet that.

Q. From one of the answers you made I rather got the impression that this break and take package was a comparatively recent development. Is that so or not?

A. I think that package is probably eight years old, to the best of my knowledge. I do not remember the package myself prior to '22. It may have been, but I do not remember it prior to that. As I have already stated, in the jobbing business I do not remember selling that type of package.

Q. Except the penny man, you said.

A. Except the penny man.

Q. These various developments are more recent, are they?

A. Yes.

Q. Putting out different kinds of prizes and different make-up of the package?

A. At first they featured a candy product as the last prize, and now they are getting into novelties of all sorts.

Q. Now, you testified as to one of your salesmen writing you a letter, I believe you said?

A. Yes.

Q. With reference to the loss of his sales because he did not carry a break and take package?

A. Yes.

Q. Have you any other instances that you know of of your own knowledge where your salesmen in the course of your business or duties reported to you and urged upon your company to resume the sale of the break and take package?

A. I remember at the different sales meetings that we had, when we discontinued them they invariably wanted them back. They invariably wanted them back. I think I can definitely say there was not a sales meet-

ing during the time we discontinued them that there was not a request to bring them out again.

Q. How many traveling salesmen does your company employ, Mr. Voneiff?

A. I think we have about eight now.

Q. Traveling throughout the United States?

A. Yes.

Q. In the territories you have described?

A. Principally east of the Mississippi River. Most all of our business is here in the East. We do not solicit the West.

Q. Does your company desire to market this break and take package?

A. No, sir.

Q. Your company would prefer not to make such a package?

A. We would prefer not to make it, provided every one would follow along. It is our opinion that nothing better could be done for the industry and the customer.

Q. Let us develop that for a minute. Why would it be better for the industry to stop this type of package?

A. Because it would eliminate a lot of candy that is inferior in quality. And if the Commission has the exhibits that I took over to them, those exhibits could be opened up for analysis of any sort and subjected to the most expert candy makers, and I feel sure that they would agree with me. What is just told you is not just my own opinion that it would be better for the industry and better for the consumer; it is the opinion —and I am going to mention names if I am permitted to.

MR. MOHUN: I object to the opinion evidence of others. Of course, you understand, Mr. Trial Examiner, that the objection I have made heretofore applies to all of this witness's testimony?

EXAMINER ALVORD: Yes.

MR. MOHUN: And especially this, where he is going to tell us what somebody else thinks.

(Argument followed.)

EXAMINER ALVORD: The objection is sustained.

By MR. ROWLAND:

Q. Have you any other reasons than the one you have given for it being a bad thing for the industry?

A. This package is a type of competition which is, in a sense, a repetition of what I have already said—it is a type of competition that if you want to meet the prize feature, this last prize feature, you have got to—just like the other fellow has—assuming that the counts are the same,—you have got to take it out of your candy, either quality or size. You can not give the purchaser an equal purchase with the prize packages that you do with staple articles. You can not do it. And I would like to say that the Voneiff-Drayer Company doesn't feel that that is the proper merchandise to put out to the consumer.

Q. In that he is not getting his money's worth?

A. He is absolutely not. There is one of that crowd gets more than his money's worth. And there are numerous—there is a number of ways that the children use in this package that they would not have to think about. For instance, they will go in, and there is forty of these on a layer. The last prize is still there. It may so happen that there is four or five of those pink centers of that bottom layer. Some kid comes in with forty cents and will buy the whole thing, and for forty cents he may get seventy-five cents or a dollar's worth of candy, where the other 120 pennies don't get a fair portion, because in 160 purchases, there is fourteen get a premium of a bar, and if he happens to be the last purchaser he gets an extra premium in this last prize. Now, there is 146 purchasers that are

actually not getting over a half cent's worth for their penny, if they are getting that much.

Q. What is the purpose in giving a prize with the last piece?

A. To attract the consumer, or rather to set up a gambling feature, nothing else.

MR. MOHUN: I move that answer be stricken.

EXAMINER ALVORD: It may go out as not responsive.

Q. What effect does the giving of a prize on the last piece have on the consumer, if you know?

MR. MOHUN: I object to the question on the same ground. The witness surmises.

THE WITNESS: I do not surmise. I make the package. I put the last prize in there to attract the kid to buy that package, because the last prize is what he is going to want. I am not surmising. I make that package.

EXAMINER ALVORD: The question is now answered. No use going further with it.

MR. MOHUN: I move to strike out the answer.

THE WITNESS: I make those things. I know what I am doing. I make those to put them in there, because I am here to state, and it is a fact, and I know it, and no surmise to it, and that is that that last prize is to attract the consumer, regardless of what the other fellow gets for his money.

Q. Have you ever, in your experience, witnessed any children buying this candy in the stores?

A. Lots of times, hundreds of times.

Q. Have you ever seen any effect that that last package, that that last prize on the last piece might have for these children?

A. Why, what I just stated relative to the buying of the last layer is what I saw. What I just stated about sticking the fingers in is what I saw. What I stated about breaking them up and throwing them on the floor is what I saw. I am not surmising a thing, sir.

Q. Now, you give us your reasons. You say this is bad from the standpoint of the consumer. Why do you say that?

A. I did not get that.

Q. You stated that this type of package was a bad thing for the industry and for the consumer. Now, you have explained from the industry standpoint. Now, how is it bad from the consumer's standpoint?

A. This one thing, that I think is bad, is the gambling feature. It is a gambling package. I do not care how you change your signs. I designed boxes just like this one here. There is nothing here on the outside of that that determines that is a gambling package, but when you take the lid off, it is tied, and I have had manufacturers tell me that I should not put my label on there, that if I did the authorities that go around and pick these things up can recognize them easier, and if you will just put a plain wrapper on it and a plain label on it, why, it is disguised to a certain extent. We ourselves were putting the trade name on those boxes, and cut it out, and did not put the trade name paper on there purposely to evade the fellow that is going out looking for this stuff.

Q. This type of break and take package that is manufactured by you is a clear gambling feature, is it not?

A. As far as I see, nothing else but.

Q. The children have no way of knowing when they look at the penny piece as to whether they will get more than a penny or just that penny piece?

A. As I stated we have actually—this is an actual fact and an actual happening in our plant. Just as soon as that small piece is made to where that consumer can pick out the piece that is a winner, then we get it back, because that must be eliminated, or else they pick out the winners, and the retailers would be hung up with the small pieces, which he won't sell unless there is a gambling feature to it. If he has got forty pieces on the bottom of that thing, and there are no more prizes in that box, he doesn't sell them.

MR. ROWLAND: I think that is all, your Honor.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Voneiff, you realize, of course, that any manufacturer, any manufacturer of draw pieces—I mean they are not protected by copyright or patent, or anything of that sort?

A. No.

Q. The field is wide open. And I think I can rightly infer from your testimony that your management is keen, and that you watch your competitors?

A. Yes.

Q. And that there is considerable competition?

A. Yes.

Q. And that ordinarily you put your goods out in an attractive manner?

A. Yes.

Q. Attractive boxes, more attractive than your competitors, if you can?

A. Yes.

Q. In an effort to kill competition?

A. Yes.

Q. In other words, all along the line you are keen in meeting competition to overcome, if you can, your competitors?

A. Yes.

Q. Is that correct?

A. Yes. But let me, if I may state this one thing——

Q. One minute, you have answered the question.

A. All right, yes, but you don't let me answer it clearly. I want to tell you what is common knowledge to the manufacturer, and that is that we know there is a state law against it. We know that the Federal Trade Commission are against it. And it is a question of whether we are going to be fearless or not. Now, if we are going out and do this thing, and the very time that I did it it was just a question of how soon was the Government going to pick me up, and unless the manufacturer has that—is willing to go out and face the situation with those things in front of him why, then—in other words, you are going out and meeting competition constantly, with the fear that sooner or later you are going to be picked up.

Q. So you, in order to meet competition, as I have stated, you put your goods out in an attractive manner?

A. Yes.

Q. You get the best salesmen you can?

A. Yes. We do not get the best salesmen to feature prizes. We get them to feature our staple goods. Prizes are something that we have to make.

Q. In order to meet competition?

A. In order to meet competition.

Q. You just recently have put out punch boards?

A. Yes.

Q. In order to meet competition also?

A. Yes. And at the same time we expect, sooner or later, to be picked up by the Government.

Q. Never mind what you expect. You realize, of course—you spoke of the laws of Maryland, or rather implied that the laws of Maryland with regard to the

sale of these candies to the public here, that you violated those laws. Of course, it is the retailer——

A. Yes.

Q. —if those laws be violated, he is the one that violates them?

A. Yes.

Q. You simply forward him the candies?

A. Yes.

Q. One of your purchasers or all of your purchasers could dispose of this candy in any manner they saw fit, could they not?

A. Yes.

Q. Have you a salesman in your employ by the name of Thomas Bayne?

A. Barnes.

Q. Barnes?

A. Yes.

Q. Is here here today?

A. No, he is not here today.

MR. MOHUN: That is all, of course, subject to my continuous objection to this witness's testimony and motion to strike out.

THE WITNESS: We all know that these laws exist, but we surely do help them to break the laws; we all know that.

MR. ROWLAND: Mr. Lank informed me that Mr. Barnes will be a witness at the Philadelphia hearing.

RE-DIRECT EXAMINATION.

By MR. ROWLAND:

Q. Mr. Voneiff, do you know any of your competitors that are making penny pieces of candy that do not make the break and take?

A. I feel sure that George Blome & Sons do not make them.

Q. George Blome & Sons?

A. George Blome & Sons, in Baltimore, and I do not think Jocelyn makes them, but Mr. Jerome Blome has told me that if it keeps up he will have to, sooner or later, make them for his own salvation.

MR. ROWLAND: That is all.

MR. MOHUN: I have no further questions.

(Examination of witness concluded.)

JOHN A. WINTZ, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Wintz, your full name is John A. Wintz?

A. Yes, sir.

Q. Where do you live, Mr. Wintz?

A. 900 East Forty-first Street, Baltimore, Maryland.

Q. In what business are you engaged, Mr. Wintz?

A. Selling candy, salesman.

Q. And where?

A. The territory I cover?

Q. Yes.

A. Maryland, Washington, D. C., a few points in Virginia. Do you want me to enumerate them all?

Q. No.

A. And a couple of points in West Virginia.

Q. For whom do you sell candy?

A. The Voneiff-Drayer Company, the Charles N. Miller Company, and the Massachusetts Chocolate Company.

Q. To whom do you sell candy?

A. Jobbing trade, wholesale jobbing trade.

Q. How long have you been engaged in selling candy?

A. Since 1921.

Q. Prior to that, did you have any connection with the candy industry?

A. None whatever.

Q. I direct your attention to Commission's Exhibit No. 8, which is marked on the outside "School Days, 200's." That is a package which has been described as containing two hundred pieces of uniform size and shape, together with eight, or several larger pieces of candy, and a school companion. Are you familiar generally with that type of package?

A. Yes.

Q. Have you handled such a package?

A. Yes.

Q. For the Voneiff-Drayer Company?

A. For the Voneiff-Drayer Company.

Q. Have you been employed by the Voneiff-Drayer Company since 1921?

A. Yes.

Q. At some time since you have been selling candy for the Voneiff-Drayer Company, I believe they have discontinued the sale of such packages, and then recommenced the sale of them again?

A. Yes.

Q. Did the sale of that package, or the failure to furnish you with such a package, affect your business at all?

MR. MOHUN: I interpose the same objection to the testimony from this witness in regard to what happened with other candies. He has named the three concerns by whom he was employed, and I judge exclusively employed, and it does not include the name of this respondent. My objection is that such testimony is irrelevant and incompetent and immaterial.

EXAMINER ALVORD: Overruled.

MR. MOHUN: And in order not to interrupt by renewing the objection, unless counsel objects, it will be considered that we have objected to all testimony.

MR. ROWLAND: Yes.

EXAMINER ALVORD: All this testimony of this character will be received subject to objection and exception on behalf of the respondent.

By MR. LANK:

Q. Do you recall the question now, Mr. Wintz, the last question that I asked you?

MR. LANK: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. Yes.

Q. In what way?

A. From a competitive angle, when I got around and had no prizes to offer, why, they were able to get prizes from other sources, and they said, "Well, we will have to have one, and consequently we will have to go other places to get it," and our house being a penny goods house, why, it did affect it.

Q. Making a distinction between these packages which we will call break packages or draw packages and staple goods or straight goods, did the failure to include a break package in your line affect your sale of staple goods?

A. Why, I cannot say the failure of one particular box affected it, but generally it did. That is, when there was a demand for the break package and we did not have it, and they wanted a break package, it naturally affected the sale of staple merchandise. In other words, when I went in to a customer and he

wanted a break prize and he wanted some penny goods, why, he might buy some penny goods from me and he might not; he might buy penny goods from the man he got the prizes from in order to get his tonnage up on his shipments.

MR. MOHUN: That answer is susceptible to particular objection, as he says that some prospective customer might do something or he might not. I move to strike it.

EXAMINER ALVORD: Motion granted.

MR. LANK: If your Honor please, your Honor has ruled on that, but naturally I want some of that answer in.

MR. MOHUN: Frame a question.

MR. LANK: I think it is admissible. I am asking here the effect on his business, and I think he can tell what effect it has had on his business.

EXAMINER ALVORD: The trouble with the answer is that part is speculative and part is not. If you get in that part that is not speculative, why, we will talk about that.

By MR. LANK:

Q. You say that the failure to include a break or a draw package in your line did affect your sale of staple goods, Mr. Wintz.

A. I do not know just how to answer that. It affected the sale of my merchandise, that is, my commission check, the tonnage, the volume that I did at the end of the year. Now, for me to say that it stopped me from selling a certain box of a certain kind of goods, I could not say that, but it did affect my earning capacity, my volume of business.

Q. Now, at the end of the year, was your loss of business limited solely to the loss of the sales of the

prize package, or did it cut down on the sale of your staple goods as well?

A. Well, I would say that the bigger volume of loss was the loss of business on the prize package. It is pretty hard to state here and tell just how much it was off, but I know that the biggest percentage of the falling off in the business at that time was due to the fact that I did not have a prize box.

Q. What proportion of your business is prize package and what proportion is staple goods, if you know?

A. You mean at the present time?

Q. At the present time, yes.

A. Well, the prize package at the present time is very, very small with me. I sort of have to hazard a guess. I would say right now that the prize business is not over—oh, 8 to 10 per cent.

Q. Was it more in the past?

A. Yes.

Q. Do you recall when you were selling for Voneiff-Drayer that you did not have a prize package on your list?

A. I could not tell you the exact date, but I remember one time that the National Confectioners had a meeting of some kind in Philadelphia, and I think it was decided that they were not going to make the package, that is, the prize, as I got it, and I know Mr. Voneiff come home at that time and said he would not have any more of the prize packages. I do not recall when that was, but I would say it was four or five years ago it first happened.

Q. You say at the present time your business is 8 to 10 per cent. on the prize package?

A. I would say about that.

Q. And you say it was more in the past possibly?

A. Yes, a few years back the prize business was more.

Q. About how much more would you say?

A. Well, at one period there it seemed to me like it was pretty near 50 per cent. of the business was on prizes at one particular period. I do not remember how long a time that was, but I know at one time getting around everything was prizes.

Q. You think it was about four years ago that they discontinued the sale of the prize package?

A. Somewheres along there.

Q. Now, the year before that, do you know about what proportion of your business was prize package business?

A. No.

Q. Approximately. I do not want to know exactly.

A. Let me see. It would be just a guess. And the year before that they quit it, they all got together and quit, I would say probably the prize business was probably running around 20 per cent. with me.

Q. And do you know about how much your business fell off the year you were without the prize package?

A. Well, we were not without the prize package a full year.

Q. Do you know about how much your business fell off for a month during that time?

A. No.

Q. Do you know how much your monthly income was reduced?

A. No, I really do not know now; I have not the slightest idea.

Q. Did I understand you to say that it was materially reduced?

A. Yes, it was for this period that we did not have the package, that it was materially reduced.

Q. Do you see or come in contact with the packages, prize packages of other manufacturers when you are going about your business in selling this candy to the jobber?

A. Do I see other packages?

Q. Yes.

A. Oh, yes.

Q. Comparing the candy in the prize package with the candy in the staple package, are the pieces that sell for the same price larger or smaller, or better quality, or poorer quality, Mr. Wintz?

A. What are you using as a criterion?

Q. Well, are they larger?

A. Generally speaking?

Q. Yes.

A. Larger than what, than the staple goods?

Q. Yes, of the same manufacturer. Is the prize package, is the prize candy or the pieces that are in the price package of Voneiff-Drayer larger or smaller than the pieces in their staple package that retail for the same price?

A. The individual pieces that sell for a penny apiece?

Q. Yes.

A. They are smaller, not only Voneiff-Drayer's, but everybody's. In a general way I may say every one.

Q. In every package that you have had an opportunity to examine?

A. Yes.

Q. Is there a demand for this prize package from the jobbers?

A. Yes. In some places it is more noticeable than other sections. But it seems to be a piece that is universally sold.

Q. You do not sell any retailers at all?

A. No.

Q. Have you talked with or come in contact with retailers who do sell this kind of candy, Mr. Wintz?

A. Yes. I have not come in direct contact with them. The only thing I do know is what I get from the

jobbers' salesmen, their reactions to the way some of the retailers speak about it.

MR. MOHUN: The objection is that he does not go further on that and tell what they told him.

MR. LANK: I am not going to ask him what they told him.

EXAMINER ALVORD: The situation is harmless at the present time.

By MR. LANK:

Q. You say you have been selling candy since 1921?

A. Yes.

Q. In selling this type of package, do you think the ultimate consumer gets the same value for his money as he does in purchasing staple articles or straight goods?

A. No.

Q. Are you opposed to the sale of this type of candy?

A. I am.

Q. What are your reasons?

A. Well, my reasons are: In the first place, the purchaser does not get fair value. In other words, one person gets a certain thing for a penny and the other person pays the same penny and does not get the same thing, and the buyer gets unfair value there. In the second place, I am opposed to it for the sake of a whole lot of people putting out inferior candy with a trinket or prize, or something in there for the sake of helping the candy to sell. In the third place, having children, being the father of children, I do not like to be teaching children to take a chance.

Q. Have you ever seen children when they were actually purchasing that candy in these packages?

A. Have I seen them?

Q. Yes.

A. Yes, sir.

Q. Will you state what you saw when they were purchasing this candy? What was their method of purchasing it, and how did they purchase it?

A. Well, they would come in, and if they could get hold of a box they would pick over them and paw over them, and try to guess at the white center or pink center, in order to get a prize. And in some cases I saw the retailer take a lot of boxes out, lay them up in sight, and the kid would say, "Give me this one, or this one or that one," hoping he would get a pink center.

Q. Did you see any of them spend considerable money in the purchase of this type of candy?

A. Well, I have seen a child come in with a nickel and spend the five pennies for that type of candy. Of course, my observation of this has simply been when I have been in the store buying a cigar, or something of that kind. I had no business in the store in a business way. And naturally if I seen anybody come after that, why, I would just naturally watch.

Q. And when you did not have this prize package, it affected the amount of sales that you made, when you did not have this article on your list?

A. Yes.

MR. LANK: You can inquire, Mr. Mohun.

MR. MOHUN: I have no questions.

(Examination of witness concluded.)

(Thereupon, at 12:30 o'clock P. M., a recess was taken until 2 o'clock P. M.)

AFTER RECESS.

J. O. HUBER, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. ROWLAND:

Q. Please state your name, residence and occupation, Mr. Huber.

A. J. O. Huber, 5314 Norwood Avenue, Baltimore, Maryland, candy broker.

Q. How long have you been a candy broker, Mr. Huber?

A. About sixteen years.

Q. What do you mean just by candy broker? For the purposes of the record, just what is it?

A. I might term that a little more explicit by saying candy manufacturers' representative.

Q. Do you work on commission entirely?

A. Strictly; yes, sir.

Q. What companies are you connected with?

A. Charles N. Miller Company, Boston; Massachusetts Chocolate Company, Boston; Voneiff-Drayer Company, Baltimore; Fred Foos Company, Baltimore.

Q. Is that all?

A. Yes, sir.

Q. Do you travel, Mr. Huber?

A. Yes, sir.

Q. Where do you travel?

A. Southern territory.

Q. What states?

A. Virginia, North and South Carolina.

Q. And you sell the products of these four companies that you have mentioned?

A. Yes, sir.

Q. And what class of goods do you sell?

A. Well, penny goods, bulk goods and solid chocolate. By solid chocolate I mean solid chocolate bars,

solid chocolate penny goods. There is no cream in that. It is just pure chocolate.

Q. In the goods which you carry, do you have any so-called break and take goods, penny goods?

A. At the present time I have one item, yes, sir, which I might term that.

Q. Who is that made by?

A. Voneiff-Drayer.

Q. Have you in the past handled other break and take goods other than Voneiff-Drayer's?

A. None other, no, none of the manufacturers that I represent.

MR. MOHUN: I desire to enter an objection to the testimony of Mr. Huber on the same ground as heretofore entered to the previous witness.

EXAMINER ALVORD: The same ruling, and exception granted.

Q. These other three companies do not make penny break and take?

A. Yes, one of them does, Fred Foos.

Q. But you do not handle that?

A. Yes, I say I do handle that. That is, in season. They make one around the Christmas time, around the fall season, and then one around Easter time. It is a season proposition. It is not a regular proposition. It is a seasonal proposition.

Q. With the goods which you handle of the Voneiff-Drayer Company, what proportion of those sales are penny break and take?

A. Well, I am safe in saying three years ago that it represented between 40 and possibly 50 per cent. in my business for them.

Q. Three years ago?

A. Yes, sir.

Q. And now that is what?

A. Well, now, I would say right now at the present time, the fact that there has not been any change that they have not made in new goods, I suppose I would say that it represents about 5 per cent., between 5 and 5½ per cent. possibly.

Q. You sell the jobbing trade, do you?

A. Yes, sir, only.

Q. Do you sell retail at all?

A. No, sir.

Q. Is there a demand for break and take goods from the jobbers?

A. At the present time there is a very active demand, yes, sir.

Q. Since you have been selling that type of package, is there an increasing demand?

A. Yes, sir, an alarmingly increasing demand, I would say.

Q. Your competitors in your territory handle that type of goods, do they?

A. Yes, sir.

Q. Mr. Voneiff testified this morning and stated that I think two or three years ago, or three or four years ago, he discontinued selling the break and take package?

A. Yes, sir.

Q. Were you with the company at the time of that discontinuance?

A. Yes, sir.

Q. You had handled it before that time when they were making it?

A. Yes, sir.

Q. And then you discontinued when they were not making it and took it on again?

A. I introduced the package in my territory for them.

Q. During the time that Voneiff-Drayer was not furnishing you with the break and take package, did you notice any difference in your sales?

A. Absolutely; not only in my sales, but in my earnings.

Q. In just what way?

A. Well, as I said, it is to the extent of around about between 40 and 50 per cent. of my volume was done on the break and take business.

Q. And after your loss? After that was discontinued, you lost that much business?

A. I lost that much business; yes, sir.

Q. Did you request your employer, Voneiff-Drayer, to reinstate such package?

A. Yes, sir, very emphatically.

Q. And why did you do that?

A. Due to the fact of my earnings.

Q. And what was the reaction of the jobbers to that during that period when you called on them?

A. I do not understand that question.

Q. What I mean is when you were not handling that break and take package and you called on your trade?

A. They were buying it from our competitors.

Q. They were buying it from your competitors?

A. Yes, sir.

Q. Did the fact that you did not handle the break and take line have any effect on your sales to jobbers of straight goods?

A. Quite a bit, yes, sir, quite a bit.

Q. Did you ever find in your experience that jobbers linked their sales of staple goods with the break and take goods?

A. Yes, sir, very much.

Q. Did you have requests during that time from your jobbers to put in such a package?

A. Repeatedly; yes, sir.

Q. And after Voneiff-Drayer supplied you with such a package, were you then able to sell the same jobbers you had not been able to sell before?

A. Yes, sir. I do at the present time.

Q. Had you ever examined the break and take candy, the penny piece itself, with other goods in your line, the straight penny candy?

A. Yes, sir.

Q. What is the comparison as to value, size or quality?

A. Well, I might explain it to you this way: You take on an average a piece of penny goods, which we term 120 count—that is the unit of the box of penny goods that we sell from the manufacturer to the jobber at sixty cents—and I would say 80 per cent. of the manufacturers are giving a fair grade of a good quality of merchandise in the regular piece of penny goods. Take the break and take today, the unit runs around 160 penny pieces, plus twelve or fifteen five-cent numbers, and on top of that a major bar for just exactly twenty cents more; so consequently something must suffer, and you must take it out of the quality of merchandise to overcome that additional amount of merchandise that is put in the box. And my experience particularly was, of the pieces that are made by what we call gyp houses—that is, candy manufacturers who do not have a very good standing in the industry—it is almost all scrap merchandise. Some of it is not even fit to eat. In fact, I would not permit my child to eat any of it.

Q. Ordinarily, in the goods that you have seen, will the break and take penny piece be as large as the staple, straight penny piece?

A. No, sir. It will run—it won't run a third in size, I don't judge.

Q. So the value to the ultimate consumer is not as great in buying a penny piece of break and take as in buying a straight penny piece?

A. No, sir. Personally, my opinion is that it is a gyp proposition from the start to the finish.

MR. MOHUN: I move that the answer be stricken.

MR. ROWLAND: I ask that the answer be allowed to remain. He is testifying from experience.

EXAMINER ALVORD: Before I pass on that, I would like to know what the witness means by a "gyp proposition"?

THE WITNESS: Well, it is meant this: It is a modification of a steal, I would say. It is a misrepresentation of what it should be. The merchandise in itself is under size and the quality is poor. A child is naturally caught, and it is often flattered—it is not flattered by the piece of goods that it buys for the penny, but the instinct of gambling, the possibility of picking a pink center and getting that major prize, or getting the bar is the foremost thought in the child's mind.

EXAMINER ALVORD: With that explanation the testimony will stand subject to exception.

Q. You say that during the time you did not handle a break and take package, your business fell off 50 to 60 per cent.?

A. Well, I would say easily 40 per cent., between 40 and 50 per cent.

Q. And you attribute that solely to the fact that you did not carry a break and take package?

A. Absolutely, sir.

Q. Do you have any reason for thus attributing it?

A. Yes, easily. I have accounts that bought as high as, well, as high as three thousand dollars' worth of breaks and takes from me in a year, single accounts. Those same accounts are buying over eight and nine hundred dollars at the present time from me on regular merchandise.

Q. During the time they were buying this three thousand dollars' worth of breaks and takes a year,

were they at the same time buying from you your straight goods?

A. Straight goods, yes, sir.

Q. When they were not able to obtain break and takes from you, did they discontinue buying straight goods?

A. To a considerable extent, possibly one or two items which were special in our line, and that they had built up a business on. I speak particularly there of mints and solid chocolate stuff.

Q. From your experience in the candy business, have you any opinion as to the effect on the business of the sale of the break and take package, as to whether it is a good thing or a bad thing for the industry?

A. Well, generally speaking, any merchant naturally is handling a product that is turned over fast, and he realizes that is possibly the best article to handle, but I would safely say that if you put down 90 per cent. of the jobbing trade, without a doubt they would all say this, that they would be tickled to death to see the break and take business stopped. Now, the retailer, he has a little corner confectionery store, and has not anything else to do but just watch the kids; he will prefer it. You take the grocer, he does not. Now, there is two reasons why he won't. He does not have time to watch the youngster. In other words, I will put it this way: The break and take business is educating the child to be dishonest. If he places a break and take out on the corner where the child can pick his own pieces, they have gotten into the habit, where they can, nicking a little end with their finger-nails, to find out whether it has a pink center. If it is a wrapped piece, and they get a little tag in it, or get nothing, and with the tag there they get an extra bar. If they happen to be put on a table, or something like that, the youngster will come up and make it disappear, and walk out of the store, and come back and pass things over and get

a bar. In other words, the wholesale grocer or merchant is being gypped himself, and before he knows it he is out of all free bars, and he is out of money on his package.

MR. MOHUN: I move to strike the answer. It is impossible to tell from the response of the witness how much of it, or if any of it is of his own knowledge.

MR. ROWLAND: I will ask him right now.

EXAMINER ALVORD: All right.

By MR. ROWLAND:

Q. I will ask you if you have seen any instance of the child doing this?

A. Yes, absolutely so.

Q. In a retail store?

A. Yes.

Q. Could you just give us an instance of that?

A. The reason I say it—you ask me the question—I do not call on any retail trade, but it happened in this way. Sometimes a jobber has in conjunction with his jobbing business a retail store, which I have quite a few of them. We find more of them in my territory, possibly, than you will in this territory. And it is oftentimes that we have to wait around, for he is either busy or he is out, and we have to wait until he comes in, and stay there, and you can watch what happens, you can watch what is going on, and I have actually seen them do it, and I have asked questions about it to inform myself on it, and I have actually seen the youngsters do it. There is always two or three of them together, and I have seen them pass one slip to the other boy, and the other boy go out of the store, and I have seen that other boy come back. And I have conversed with the jobber who is naturally running the retail store at the time, and he says, absolutely, we

have it here every day. Now, it happens that most of them keep them in the show case, and the youngster says, "Give me this one or that one," and the merchant picks it out to keep from being gypped.

Q. Now, that is where the jobber has a retail business. Have you ever seen the children come in there to purchase, and seen the effect on the business of the break and take package?

A. I have a very concrete example of that. I would say possibly six months ago in Wilmington, North Carolina—the jobber's name was Harrell—at that time he was running a filling station, a retail store and a jobbing business on Market Street, either Fourteen or Thirteenth and Market, I am not sure, it is one of the two streets. I got in there about fifteen or twenty minutes before school, and there happened to be a public school right next door to him and the high school across the street from him, and I happened to get in there one morning around fifteen or twenty minutes before school opened up, and he was very busy, and he could not talk to me, due to the fact that the youngsters were all flocked in there, and at that time it was very vividly brought to my mind that the break and take business was the ruination of the candy business. He had a show case filled with legitimate goods, five-cent goods and penny goods, and on top of his showcase he had around fifteen or twenty break and take, and not a penny's worth of stuff did he sell of the regular merchandise. And I saw one little girl come in there and spend twenty-five cents and walk out of there with two lousy bars. And the other part that came to my mind was this, that every break she picked up and broke to see whether there was a pink center. She did not eat that piece of merchandise, but she threw it away, and it cost her twenty-five cents to get two bars. And I just thought right then and there that child's mother

is giving her twenty-five cents possibly to buy something substantial, and here she has got two lousy bars for twenty-five cents. I was in there fully fifteen minutes, that the merchant had not rung up any sales. There were three people waiting on them, he and his two assistants. They just laid their money on the counter, and when the children went out he rung it up on the cash register, and it figured out ten dollars and some odd cents he had taken in. He had taken in nothing but breaks and takes in fifteen minutes while I was in the store.

Q. During that time he had not sold anything else?

A. Not a piece of penny goods. To come back on that same subject, after they went out I opened up my regular line, and he did not buy a nickel's worth of it. I think if I recall correctly, I think he bought two or three cases of breaks and takes from me.

Q. How many packages in a box?

A. We term a case forty-two boxes.

Q. That would be forty-two boxes similar to one of the exhibits here?

A. Yes, the same sized box here, 160 pieces.

Q. Have you ever seen any other instances of that kind in any other stores, Mr. Huber?

A. Well, just as I say, the stores that I just happened—jobbers who just happened to have retail stores in connection with their business. This particular jobber incidentally has given up his retail end and is confining himself strictly to wholesale business now. And he is a very small buyer, a very small buyer now, of breaks and takes in any line.

Q. What effect, if any, do you think it has on the child,—the sale of the break and take package?

MR. MOHUN: That question is clearly objectionable. The actions which have been taken speak for themselves. Do you mean physical effect, mental effect, or financial effect?

MR. ROWLAND: I want to know the extent of the effect it has.

By MR. ROWLAND:

Q. I will put it this way: Do you think the sale of the break and take package to the child has any effect in inculcating in that child a gambling instinct?

A. Absolutely, yes, sir.

Q. Have you seen any of that?

A. I have seen it in my own home. My youngster came home not long ago and asked her mother for eight cents. She asked her what she wanted it for. She said she had been up to the store and punched the board, and she did not have the money, and the merchant would trust her, and she came back to get eight cents.

MR. MOHUN: This is interesting, perhaps, but what does it have to do with the issues raised in this complaint? What it has to do with it is more than I can conceive.

THE WITNESS: Those are facts.

MR. MOHUN: He never handled this respondent's goods, and as far as I know he knows nothing about it. What happened to his child getting eight cents is pretty far afield from the very definite issues.

EXAMINER ALVORD: I quite agree with you, Counselor.

MR. MOHUN: The objection is sustained, I surmise.

EXAMINER ALVORD: Yes, the objection is sustained, and the answer will be stricken.

By MR. ROWLAND:

Q. I will ask you, Mr. Huber, what effect the sale of the break and take package in your experience has upon competition in the candy business?

MR. MOHUN: That is asking for an opinion answer.

(Argument followed.)

EXAMINER ALVORD: The witness may answer by telling us what he knows about it.

MR. ROWLAND: That is satisfactory.

A. Well, I can say this, that there are several houses that up to the event of the tremendous sale of break and takes were lying pretty dormant, practically doing no business. One today is doing substantially 100 per cent. in break and take business, and I venture to say that they have all the business that they can take care of. In fact, they are behind on deliveries. In my own particular territory, five years ago R. F. Keppel & Company had a broker, the same as I am—R. F. Keppel's line was a very small line, a very small item; I just do not know—I would not say just exactly when, but I would say within the past two years, which they have gone into the break and take business, and gone into it putting money into certain pieces that they make, this particular man has been able to throw over all his other lines and confine himself strictly to the exclusive sale of R. F. Keppel's breaks and takes.

Q. Will you state the name of that broker?

A. Mr. John W. Davis—well, John Davis. I do not know his initial.

Q. Have you finished on that?

A. Yes.

Q. I will call your attention to Commission's Exhibit No. 4, and I will ask you if you are familiar with that package. I do not know whether you have seen it?

A. Yes.

Q. That is one of R. F. Keppel's packages?

A. Yes, sir.

Q. Have you seen that in your territory?

A. Yes.

Q. Have you met it in competition?

A. Yes, sir, absolutely.

Q. I now call your attention to Commission's Exhibit No. 8, School Days package.

A. That is the school companion?

Q. Yes.

A. Yes, sir.

Q. Have you seen that package in your territory?

A. Yes, sir.

Q. Met it in competition?

A. Yes.

Q. I call your attention to Exhibit 1, Chocolate Penny Men. Have you seen that item?

A. Not the particular item. I remember two packages, two items, the Penny Cops and the Penny Mice, that had pennies packed in them, that they discontinued making about a year ago, and my business absolutely has been taken away from me by R. F. Keppel on those two items, due to the fact that my pieces have no pennies in them and their pieces do have the pennies in them.

Q. From your experience in the business, which you have been in some fourteen years, I believe you testified?

A. Yes, sir.

Q. What is your opinion as to the use of this break and take package on the candy business?

A. Well, it has been the greatest evil in demoralizing that I have seen in my fourteen years in the business.

Q. Why?

A. Well, it is an illogical unit. It is a bothersome proposition. It has gotten to the point, where they first started out they did give quality and now the ultimate buyer, which is naturally the child—but the retailer and jobber are making demands upon the

manufacturer, where he has got to increase the value of his capital prize. As he increases the value of his capital prize, he must decrease the value of his merchandise. There are several breaks and takes out. One of them is giving away an air rifle in summer. There was one gave away a big league bat, a baseball bat, baseball mitts, baseballs, and they are all supposed to be standard big league merchandise. And it has just gotten to the point where if it keeps on, there won't be any candy left in them at all. The candy industry will not be here. We will be selling novelties instead of candy.

Q. It has a bad effect, then, on the quality of candy then?

A. Absolutely, yes, sir.

Q. Is it customary in the break and take package for the prize that accompanies the last piece to be the most valuable prize?

A. Supposed to be, yes, sir, if you want to sell it, yes, sir.

Q. Well, I mean as the package is put up by the manufacturer, the most valuable prize is the one that accompanies the purchase of the last piece?

A. Yes, sir, that is the whole thing, that is the sole sum of it, your capital prize. When you go in to sell a break and take, any salesman that has the break and take, he does not talk about how many bars he has in it, or what is in the bar, or anything about the penny piece; he talks about that capital prize. They are giving a baseball bat and giving air rifles for the last prize, and that is the thing that stimulates the child; that is the thing that draws the child's attention to it; that is the thing he is working for. He will come back day in and day out to see if he has cleaned down to that last drawer and if he has got ten cents and ten pieces in there—Bowie! he gets the ten pieces and he is going to get the capital prize.

MR. ROWLAND: You may cross-examine.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Do you know Mr. Ruef, vice-president and treasurer of R. F. Keppel & Company?

A. No, sir, I never met him. That is, I do not know him personally. I have seen him, but never met him.

Q. If I should tell you that Mr. Ruef has testified in this case that with his draw pieces, candies put out by his company, that the value, the total value of the package, of the draw pieces, of the candies, was equal to the full value of what you call these straight goods, would you think he was correct? Have you anything which leads you to believe that that testimony was incorrect?

A. Well, that would depend entirely upon what standard he is making his goods on.

Q. I did not ask you that. You have stated that you have seen Keppel's goods.

A. Yes, sir.

Q. Now, I tell you that, as I have——

A. As a competitor?

Q. Let me finish, please.

A. Yes, sir.

Q. If I tell you, as I have, that he has testified that the quality, weight and quantity of the candies put out in their pieces is equal to those in his straight line, would you say he knows what he is talking about?

MR. ROWLAND: May I suggest to you—of course, this is cross-examination, but I do not think that is an entirely correct statement, counsel.

MR. MOHUN: I will take the responsibility of that. It is on the record.

EXAMINER ALVORD: I would not attempt to recall just the language that he used when he was

testifying, but it seems to me that is the substance of it.

By Mr. Mohun:

Q. We will assume that I am correct in that. What is your answer?

A. Well, I would answer that question in this way: Before R. F. Keppel went into the break and take business to the extent that they are right at the present time, they had very little regular business in the penny chocolates, due to the fact that they were easily outsold on a quality basis. At the present time when it comes down to regular penny chocolate goods, I will take the City of Richmond and take the City of Norfolk, that I get out of that territory easily 75 per cent. of the penny chocolate business that goes into there, and it is got only and strictly on a quality basis. Mr. Davis happens to live in Richmond, and he is well known among the jobbing trade, and I do not believe that Keppel has more than one or two pieces of his regular merchandise in that section there, due to the fact of the quality basis, and I am leaving that entirely to the jobbers judgment. I would say this, that if Mr. Ruef made a statement of that kind, naturally he is in his business and figures his costs and knows what he is making, but I have no hesitancy to say that on an equal basis on straight merchandise, the way R. F. Keppel makes it, and the way Voneiff-Drayer makes his penny goods, I can sell rings around R. F. Keppel on the quality basis.

Q. When you speak in your direct examination of goods being grossly inferior in the draw pieces as compared with the straight pieces—I mean inferior in quality——

A. Yes, sir.

Q. —did you refer to Keppel & Company's goods?

A. Not necessarily, no.

Q. Well, did you refer to Keppel & Company's goods?

A. No, sir, I did not.

MR. MOHUN: That is all.

MR. ROWLAND: I would like to ask a few other questions.

RE-DIRECT EXAMINATION.

By MR. ROWLAND:

Q. With reference to that question that counsel asked you of Mr. Ruef making a statement that the quantity, quality and value was the same in his straight goods as in the break and take package, will you consider in that the items separately? Would you say that the break and take package of Keppel's, as far as you have been familiar with it, is the same quantity or quality piece of merchandise for a penny as in the straight penny goods that Keppel makes?

A. No, sir, it could not be, for one reason; I would say this: My candy experience has taught me that, and I have been in it long enough to know it—I say I am just taking it on what I think. The penny piece in the break and take would be naturally coated with the cheapest possible chocolate, which is chocolate liquor. With the penny piece straight, competition would compel them to use a higher grade of chocolate, which possibly cost them several cents a pound more.

Q. How about the size?

A. The size, it is smaller, naturally it would be smaller.

Q. Then, it may be that the package including the prizes may be just as valuable as the straight goods, which has no prize, but it would be because of the prizes in there and not the penny pieces themselves that would make the value equal, is that correct?

A. Well, no. Is this a full box (indicating)?

Q. No, not now.

A. Well, what I want to say was this. If you have not got it there, it is perfectly all right. However, I will take a look at it. There is a piece of goods (indicating). What I wanted to get at was this: You have asked me a question, and maybe I can bring it out. Mr. Ruef may be right and he may not. Of course, he figures his costs on the average piece of regular merchandise, that is the 120-count pieces, and the merchandise will run from three and one-half to four and one-quarter pounds per box. With the 160-count break and take, including the bars, the capital prize and the penny pieces, it will run anywhere from six to eight pounds, and only twenty cents additional. It would be awfully hard for any man to tell me that he is giving the same quality in his break and take for twenty cents more that is giving six or eight pounds more for twenty cents, than he would in a regular penny piece of goods. Now, I believe that that is logic and any man could see that. His piece of goods has a straight liquored coat on that, that is, a straight chocolate piece of goods, straight liquor coating on there.

EXAMINER ALVORD: What kind of coating did you say it is?

THE WITNESS: What they call liquor coating. That is one of the cheapest grades of chocolate that the manufacturer buys from the coating manufacturer.

MR. ROWLAND: The witness was referring to Commission's Exhibit 1 at that time.

THE WITNESS: You take your 1-2-3 there, for instance, the next box you have there.

By MR. ROWLAND:

Q. This one (indicating)?

A. Yes.

Q. Commission's Exhibit No. 4, the 1-2-3. (Handing exhibit to witness.)

A. Of course, it would be legal for Keppel to say that 1¼ ounces according to their way of figuring is a legal five-cent bar. There is nothing in the world that would prevent them, provided that the public would buy this bar for a five-cent bar. To give you a concrete example, put this bar down there, which weighs 1¼ ounces, Peanut Chew, and Milky Way weighs 2 to 2½ for the same price. The average five-cent bar today is running around two ounces.

Q. Well, to correct you, not knowing, of course, Mr. Huber, this bar in Commission's Exhibit No. 4 sells for either one cent, two cents or three cents?

A. Yes, sir.

Q. Depending on what they draw?

A. The misrepresentation is there that the child is getting a five-cent bar for one cent, two cents or three cents. That is what it originally started out with. Now, here is the story. That has sixty bars in it at 1¼ ounces. That comes out, at sixty ounces, a quarter of sixty is twenty—twenty-five; that is eighty-five ounces we will figure.

MR. LANK: Seventy-five ounces.

THE WITNESS: Seventy-five ounces, all right. (Computation made by witness.) That is almost five pounds to the box. There is not a regular five-cent piece of goods on the market which has twenty-four counts that will run over that. You can figure it out. Take Milky Way at two ounces to the bar, twenty-four bars; that is forty-eight ounces; sixty cents. Now, Keppel's is giving 4½ pounds, 5 pounds of candy, for the same price that any other manufacturer is giving twenty-four bars for, with two pounds less candy in it, and you certainly have to take quality away from the candy

to give more candy. There is no argument on that. Sugar costs the same to Keppel as to Voneiff or anybody else. The raw materials cost the same. Of course, there is a difference in manufacturing, I will grant you that. The man that is top notch, why, maybe his costs are a little less for doing business. His selling costs may be a little less. His overhead may be a little less. But there is such a big difference there that it has gotten down, as I said before, to use the word and term "gyp"; and that is about all that the break and take, and the 1-2-3, and the 1-2-3-4-5 has turned out to be. It is to skin the poor child out of a penny. And I mean in that——

By Mr. Rowland:

Q. I am referring to Commission's Exhibit 8, which is the School Day's assortment. There is one of the penny pieces in that assortment (handing article to witness). What kind of coating is that?

A. That is a straight liquor coating.

Q. That is what you refer to as liquor coating?

A. Liquor coating, yes, sir. It is not a flavored coating. Now, that is a big piece. I will give them a mint—that is just a little exaggerated (referring to diagram). That would be just about the difference between that piece and the regular penny piece.

Q. And the regular straight penny piece is ordinarily covered with a higher grade of chocolate?

A. A higher grade of chocolate.

Q. And that costs more?

A. That costs more, cost to manufacture may be 2, 3, 4 cents a pound. It just depends on who the manufacturer is.

Mr. Rowland: You may examine.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. Referring to Peanut Chew, Exhibit 4, I call your attention to the fact that it is stated on there, over the name of R. F. Keppel & Brother, Inc., "Net weight not less than 1¼ ounces."

A. Yes.

Q. As far as you know that is correct, is it not?

A. Yes.

Q. I will ask you to look at one of those pieces, also the container, and tell me whether or not you find any reference thereon to a five-cent bar?

A. No, I did not say that. I said I did not refer to that. I said originally the break and take started out that way.

Q. I beg your pardon.

MR. MOHUN: Just get that question, Mr. Reporter.

A. When the 1-2-3 first came into business, as a sales argument all our salesmen went out with the sales argument to put up or to start the 1-2-3 pieces going with the jobber, that we were selling a five-cent bar with the possibilities of a child getting the five-cent bar for one cent, two cents or three cents.

MR. MOHUN: I will ask the stenographer to turn back in his notes and read what you said in regard to that, or the equivalent fact that this bar of Keppel contained in Commission's Exhibit No. 4 was represented as a five-cent bar; in other words, there was a misrepresentation to the child.

(Testimony read by the reporter.)

By MR. MOHUN:

Q. In reference to your statement on re-direct examination, "The misrepresentation is there that the

child is getting a five-cent bar for one cent, two cents or three cents," referring to Commission's Exhibit No. 4, I would like you to point where the misrepresentation is that you referred to.

A. I am not—I did not refer to any particular bar. I said the bars in general were put out at one, two or three cents.

Q. I asked you about misrepresentation and that is all I asked you about, and you were referring to this exhibit. Now, you have got the exhibit before you. Where is the misrepresentation?

A. As I said, as far as the misrepresentation of the bar is concerned, there may not be any misrepresentation there. Keppel, or anybody else could make a half-ounce bar, and if the public wanted to buy it for five cents, that would be up to them. I am saying that the average five-cent bar today is running 2 to 2½ ounces.

Q. Well, then, there is no misrepresentation.

A. I do not believe that I intended my answer to say that there was misrepresentation.

Q. Let me finish my question. The stenographer cannot record us both at once. Then there is no misrepresentation on Commission's Exhibit No. 4, being manufactured by R. F. Keppel & Brother, Inc.

A. Well, now, I do not know how to answer that question. Possibly there may be and there may not be. That I cannot answer, because the manufacturer knows better than I do.

Q. Here is the exhibit, my dear sir, and I ask you to point to any misrepresentation there. You used the word "misrepresentation." I did not put it in your mouth. It is a very serious thing to say about a reputable manufacturer, that he is misrepresenting his goods, and I hope you will be kind enough to admit it, if you are wrong and explain it, if you are right.

A. I have tried to show you that I did not say R. F. Keppel was misrepresenting. I say generally speaking, I was trying to bring out the difference in the weight to bear out the quality against the regulation five-cent bar.

Q. My dear sir——

A. Now, it is possible—I have not weighed that bar. That bar may weigh quite a bit under an ounce and a quarter, which often happens.

Q. That is not responsive at all. You used the word that there was misrepresentation that that bar was a five-cent bar.

A. I did not mention, I did not specify Keppel's name.

Q. You had that exhibit before you, and you knew it was made by Keppel.

A. I said generally speaking when they were first introduced.

Q. If the stenographer can find where you said "generally speaking" in response to that question, I think it is incumbent upon you to have him do so.

A. That is what I intended to say. I will say then there is no misrepresentation in that bar, to clear you up.

Q. Thank you. Children might be guilty of shoplifting whether the goods were draw goods or not, isn't that true?

A. That I am not in a position to answer.

Q. I mean goods open and displayed like that.

A. I do not know anything about shoplifting.

Q. You have just testified on that.

A. Not anything about shoplifting.

Q. No you did not use that word.

A. Absolutely not.

Q. They might take an apple or any other article that is on display?

A. Yes, that is tempting enough to the child. I might add on that question, that is one reason why the break and take is breaking down the morals of the child, because it adds an additional temptation to it, if it is so exposed, that they can actually do harm to themselves.

Q. You state that the break and take candies are breaking down the morals—you said "child," which, of course, is plural—have you anything to predicate that judgment upon, other than the testimony you have given?

A. Other than the child naturally does not have the sense of responsibility of right from wrong that an adult has.

MR. MOHUN: I think that is all. We could run on indefinitely on this.

MR. ROWLAND: That is all I have.

(Examination of witness concluded.)

(Thereupon, at 3:10 o'clock P. M., an adjournment was taken until Monday, October 6, 1930, at 2 o'clock P. M., Room 425, Post Office Building, Philadelphia, Pennsylvania.)

Philadelphia, Pa., October 6, 1930.

Met pursuant to adjournment, 2 o'clock P. M.

Before ELIAS C. ALVORD, Examiner.

Appearances: HENRY C. LANK and G. EDWIN ROWLAND, for the Federal Trade Commission;

BARRY MOHUN, Washington, D. C., attorney for respondent.

EXAMINER ALVORD: Are you ready to proceed, gentlemen?

MR. LANK: Yes, sir, we are ready, if your Honor please.

MR. LANK: Mr. Examiner, I am going to ask Mr. Schmidt and Mr. Barnes if they will step outside while the first witness is being examined.

(Witnesses complied with counsel's request.)

MR. MOHUN: Before any witness is examined I would like to make a motion and objection and brief statement.

Mr. Examiner, counsel for the Commission in this case seems to think it is an investigation of the candy industry, which might, if the proper orders were issued, either by the President of the United States, by the House of Congress or Congress, be continued, but solely under Section 6 of the Federal Trade Commission Act as shown by the complaint in this case. This proceeding is brought solely under Section 5 of that act. It is sought by these proceedings to obtain from the Federal Trade Commission an order to compel this

respondent to cease and desist from conducting a part of its business from which it derives 60 per cent. of its income. Counsel for respondent again moves that all evidence heretofore given in respect of the products or actions of any manufacturer other than this respondent be stricken from the record as irrelevant, incompetent and immaterial. Respondent respectfully insists it is entitled to a ruling on this motion at this time, and respondent gives notice in the event said ruling denies or postpones this motion, respondent will move that further taking of evidence in this case be suspended until the Federal Trade Commission has opportunity of passing upon respondent's motion. The complainants in this case, under Section 5, charge this respondent with action in the handling of its product which is alleged to have resulted in "unfair competition." That is the sole charge—the sole issue, and it is the sole charge and the sole issue of which this Commission has jurisdiction in this case.

Nothing that someone else may have done with his or their product is pertinent. Some might consider the story of these several "holier than thou's," citizens who want to set up a new standard, as interesting (but in the meantime engaged in the manufacture of these objectionable pieces) but we cannot see how this testimony has any bearing on this case. We have dealers here who expressed opinion and horror in observing children inserting their finger nails in the chocolate covering in order to ascertain whether the filling be pink or white. I cannot conceive, by any stretch of the imagination, how such a situation, admittedly dealing with candies other than those manufactured by this respondent, could bear at all on this issue.

Further, this case has been characterized as a "test" suit. In the first place there is nothing of this sort in the record. In the second place, granting that it is in the record, or assuming for the moment that it is in the record, that cannot change the fact or alter the issue as is sought here under proceedings of a test suit.

Are the universally recognized and established rules of evidence to be thrown out the window?

Further, it might be said that the transactions concern candies of others and actions by persons other than the respondent, relating purely and solely to intrastate transactions and even if the candies of respondent were referred to, they are intrastate matters with which this Commission has no concern.

This respondent further protests that it is unfair to compel its representatives to spend time and money in traveling from place to place, with the result that nothing but irrelevant testimony in regard to the actions of others may be given.

Further, again referring to the fact there is but one issue involved here, namely unfair competition, and considering the state of the record, with this voluminous and obviously irrelevant testimony, how is it anticipated that this respondent could meet such testimony in intrastate matters, scattered in all parts of the country?

I renew the motion that all testimony relating to the products or actions of others be stricken from this record and I ask a ruling thereon at this time.

EXAMINER ALVORD: The motion is denied for reasons heretofore given.

MR. MOHUN: You have deferred ruling heretofore. You have definitely ruled that so far as

testimony relating to actions of others and their products is concerned, that it is pertinent in this matter and you overrule my motion?

EXAMINER ALVORD: I overrule your motion but put it on this ground, that it was desirable to present to the Commission a picture as nearly correct as we could get it, of the state of the industry. I might say, it is my opinion that so far as the question of unfair methods of competition are concerned, as affecting your client, that it is immaterial. The only object of letting it in is to present, as I say, a picture of the industry.

MR. MOHUN: I note an objection to the ruling of the Examiner on that point. Having conceded it is immaterial before the Commission whether or not this respondent has been guilty of unfair competition, I especially object to the evidence being received in order to give a picture of the industry as there is no such issue involved in this proceeding, the sole issue being unfair competition, and I note an exception to the Trial Examiner's ruling, and, further, I move that no further testimony be taken in this case until the Federal Trade Commission is afforded the opportunity, which will promptly be, of passing upon the admissibility of evidence in regard to the actions of others with respect to the products of others.

I think it is an imposition to make us run around the country and take testimony which the Trial Examiner has admitted is not involved in the sole issue in this case.

EXAMINER ALVORD: That motion is also denied.

MR. MOHUN: Will the Trial Examiner be good enough to do as we did before, in order to save encumbering the record with objections: Consider

that all testimony given at this hearing with respect to actions of other and products of others is objected to on the grounds stated, and that an exception is noted?

EXAMINER ALVORD: We will.

MR. ROWLAND: I think, Mr. Examiner—of course, the motion is ruled upon and ruled upon for the time being in the Commission's favor—but as I suggested before when you made your ruling—I do think in answer to the specific statements of counsel for respondent it might be well to state that the Commission's position in the matter, in substantiation of the charges of this complaint, in order to show this method of competition is unfair, that it was necessary to show its unfairness, for the Commission to call witnesses other than the respondent and also to call witnesses other than those who deal with the respondent. It is in the endeavor to show the unfairness of the method of competition that we are calling witnesses other than the respondent, and also to call witnesses other than those who deal with the respondent. It is in the endeavor to show the unfairness of the method of competition that we are calling witnesses from the trade, both those who indulged in the practice and manufacturers who do not indulge in the practice. It has been ruled by the courts the Commission's procedure in these matters is entirely correct in view of the fact that the Federal Trade Commission is necessarily a fact finding body and in order to perform its function under the act it must find out what the industry is by checking on the other manufacturers and on the public, which is the body the Federal Trade Commission is to protect. That is the reason it is declared unfair competition; because it

is unfair to the public. I think it is entirely fair and proper the Commission should show the effect on other manufacturers who make this product; those who do not make it; and also its effect upon the public.

A. E. SANDER, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Sander, your full name is A. E. Sander?

A. Yes, sir.

Q. You are president of the York Caramel Company?

A. Yes, sir.

Q. Of York, Pa.?

A. Yes, sir.

Q. How long have you been president of the York Caramel Company?

A. Since March 2, 1925, when the company was formed.

Q. Prior to that time were you connected with the candy industry?

A. I have been in the candy business all my life. I started back in 1889, so that I am in the business practically forty-two years. My position prior to going with the York Caramel Company was general manager of the American Caramel Company and the R. E. Rodda Candy Company of Lancaster and York, Pa., and their subsidiaries. They have some creameries and things of that nature.

Q. What is the nature of the business of the York Caramel Company?

A. We manufacture nothing but caramels; practically all of them "penny goods," pieces sold for one cent each, or so many for one cent.

Q. Where did you sell your candies?

A. Practically in every state in the Union.

Q. Did you ship them from Pennsylvania into other states?

A. Yes, sir.

Q. How do you sell your product?

A. You mean the method of selling it?

Q. By salesmen or how?

A. We have salesmen and brokers. We call on the jobbing trade only.

Q. How is your product packed, Mr. Sander? What size packages? How many pieces to the package, etc.?

A. We try to confine our entire line to 120 count or multiples thereof. That is, the 120 count at 1 cent; 240, two for 1 cent; 360, three for a cent; 480, four for a cent. We like to keep everything in the 120's—$1.20 income to the retailer. That seems to have been adopted as the standard package in the candy industry.

Q. What does the candy in one of your 120 packages weigh, approximately, Mr. Sander?

A. They run from three and a half pounds net to four and a quarter pounds net, and our prices are invariably, if you have reference to price 60 cents per box f. o. b. York, with a small freight allowance.

Q. I call your attention, Mr. Sander, to Commission's Exhibit No. 1 and Commission's Exhibit No. 8, which are put out by this respondent, and I ask you if you are familiar with that type of package?

A. I am not.

Q. You are not familiar with Commission's Exhibit No. 8?

A. I have never seen any of those boxes anywhere at any time.

Q. I think possibly you misunderstood my question. Commission's Exhibit No. 8 is marked as a package by the name of School Days. The testimony shows

that that package contains 200 penny pieces of chocolate-covered candies, together with several larger pieces of candy, and a child's school companion and also that the package contained a card which is Commission's Exhibit No. 9, which shows the method by which the candy is sold to the consuming public and the method by which the larger pieces of candy and the school companion are distributed to the public, and I will ask you if you are familiar with that package?

A. To a certain extent, yes.

Q. Is that package or that form of package in competition with the product of your company?

A. As penny goods, to a certain extent, yes.

Q. Does your company manufacture that type of package?

A. No.

Q. Has it ever manufactured that type of package?

A. No, sir.

Q. Why not?

A. Because in my mind there is a question of the legality or illegality of the package, and until the Federal Trade Commission through its investigations will declare it one way or the other we are not going to make it. The minute you say it is legitimate, that minute we are going after it, hook, line and sinker.

Q. Why do you think it is a question that should be dealt with by the Federal Trade Commission?

A. Because it is either a legal package or not. If it is legal we want to make it; so does everybody else. You gentlemen of the Federal Trade Commission have invariably claimed it is an illegal package and from what I have learned of the matter of the law in the case, it is all wrong so long as the different individuals get a different value of merchandise for their money. That seems to be the crux of the situation. You tell us tomorrow it is legal and we will have a dozen on the market.

MR. MOHUN: It is very interesting, but I can't see that it is relevant, and I move that all his answers be stricken out. He doesn't deal in these packages. It is a matter of opinion on his part, or intention to do something in the future—to do something if something else happens.

MR. LANK: I think the next question will clear that up.

MR. MOHUN: May I have a ruling on my motion, Mr. Examiner?

EXAMINER ALVORD: We will hear the next question first.

Q. Has the manufacture and distribution of that package affected your business, Mr. Sander?

A. Not that particular package, but the packages made by the American Caramel Company, we believe, have affected us very seriously.

MR. MOHUN: I move that all his answers be stricken out. We have nothing to do with the American Caramel Company.

EXAMINER ALVORD: The motion is granted.

By MR. ROWLAND:

Q. With reference to your statement off the record, about the appearance of your company coming to testify, of course we are only too glad to have the record show, so that Mr. Keppel will know that you were subpœnaed to come here and you had no option in the matter. You were subpœnaed, and as you gathered from objections made by counsel for the respondent, etc., it is an endeavor to find out whether this is a legal package about which you are asked to testify. I feel confident R. F. Keppel & Company will realize it is with no personal feeling on your part at all you came here; you were subpœnaed to come because we thought

you would be a good witness to help find out the facts in this situation.

A. Yes, sir.

Q. You were with the American Caramel Company?

A. Yes, sir.

Q. Up to what time?

A. Up to 1924.

Q. During that time was the American Caramel Company making this kind of package?

A. No, sir.

Q. You feel your company is particularly in competition with the American Caramel Company and other manufacturers?

A. Yes.

Q. Not cream manufacturers?

A. No.

Q. As a matter of fact, when your goods are displayed in the candy counter alongside of the creams and otherwise, there is a certain amount of competition in that, is there not?

A. To a certain extent.

Q. There is competition between the two pieces of goods?

A. To a certain extent, yes, sir.

Q. Now, you stated something off the record something with reference to prize packages of the American Caramel Company?

A. Yes, sir.

Q. I understood that was one in which baseballs were offered as prizes?

A. Yes, sir.

Q. Do you know the scheme of distribution of those packages?

A. On the same principle as this scheme right here.

Q. Different colored center?

A. No, they wrap the caramels in very heavy paper —paper you could not look through. Yes, I think it was colored. The paper was deep red so that you could not see the color inside. Either white or red, it looked red through that wrapper.

Q. These pieces sold for 1 cent apiece?

A. Yes.

Q. And if the child were lucky enough he could get one of these baseballs?

A. Yes, those were the principal prize; they had two or three bars of 5-cent goods in there.

Q. When was this package put out by the American Caramel Company?

A. I should say offhand about a year ago last March—just prior to baseball season.

Q. After that package appeared on the market, put out by the American Caramel Company, did you notice any effect on the business of your goods?

A. You can't quite feel the effect immediately. I started in business March 2, 1925. Up to and including August, 1929, we had an increase in business over the same month of the previous year since September, 1929, we have gone behind every month except this month, I believe—September. No doubt a considerable portion of that loss is due to the abnormal business conditions, but we feel back in the months where we started to go behind it was due to a great extent not only to the baseball package but to other similar packages of that kind.

Q. Other similar packages of penny goods?

A. Yes, sir. They had one they called "Humpty Dumpty." As I stated, the packages ran 120 to a box. This one package had 150 in a box. Each package—each penny's worth was wrapped in paper and each had a little ticket inside turned upside down so you could not see it from the outside. Thirty of those packages had a little sign in "Take Another" and the result was the storekeeper got $1.20 for the candy, but in the mean-

time the kid had a chance to get thirty extra pieces and for a while that piece went like wildfire. Now, I can have one of them tomorrow, gentlemen——

Q. During the time since this package of the American Caramel Company has been on the market, have you had any requests from any of your salesmen to put such a package out?

A. Yes, from most of them.

Q. Have you had any protests from any of your salesmen, as an explanation of the loss of business, that it was because of this type of package?

A. A salesman has excuses for everything.

Q. I realize that. Did any give that excuse?

A. That is one of his stock excuses.

Q. That type of package?

A. Yes, sir.

Q. And your salesmen all of them requested your company put out such a package?

A. Yes, sir.

Q. Have you ever examined that package of the American Caramel Company?

A. No, sir.

Q. You don't know anything then as to the value of the penny piece in that package as compared to the value of your piece that doesn't have a prize in it?

A. Yes, I do. I sent one to the Federal Trade Commission and wanted a ruling on it. In other words, where my package packed 120 weighing four pounds, their package, packed 150, also ran four pounds, so that they gave nothing more for the money, but thirty kids got a double piece and ninety kids were cheated out of one-fourth. Do you see what I mean?

Q. There must be a difference in the size of the piece.

A. Yes, if 150 pieces weigh as much as 120 pieces, the 150 pieces must each be smaller. Thirty kids got less because they didn't get a prize.

Q. Because they didn't get a prize?

A. Because they didn't get a prize. The fellow who wins must win at the expense of the fellow that loses.

Q. Is it possible to put the same value in the candy if a prize is attached?

A. It can't be done. The profits in the candy business are very, very meagre. The only way you make money in the candy business is by volume. If I were to tell you the average manufacturer doesn't make—according to the United States statistics, but 3½ per cent. on the entire business of the company it would give you an idea of what profit they can make and how much they can give away for nothing. Putting one baseball into a package of that sort would wipe out the entire profit of the business, if they gave the same size candy as we do.

Q. Do you consider that is an unfair advantage as against your company that doesn't put out such a package?

A. I think it is an illegal package and that is why I don't make it.

Q. Why do you think it illegal?

A. Because the value to the consumer is not the same. I have been brought up to think that is the law. Until someone disabuses my mind of it, I will still think so. It is not an unfair practice if they are all doing it. It must be fair. If you say it is legal——

Q. In your opinion it is legal?

A. Yes, but my opinion is not worth a darn.

Q. What effect do you think that type of package, put out by candy manufacturers, has on the industry as a whole?

A. I don't think I am in position to give a sensible answer to that. I don't believe anybody can.

Q. You stated, I believe, there were five caramel manufacturers other than your company in the country?

A. Yes, that is, straight caramel manufacturers that make nothing else. Almost every house makes some caramels; with them it is only one item of many.

Q. But of straight caramel houses there are five besides yourself?

A. Four besides us.

Q. Do all four of those make prize packages?

A. Not one except the American Caramel Company.

Q. So that not all the manufacturers of candy are putting out prize packages?

A. Oh, no.

Q. The reason I asked you that is I thought you stated all were doing it.

A. I meant those who were doing it—pardon me.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Sander, in the language of the street, you would say the competition which R. F. Keppel & Brother are up against is "fierce"?

A. All of us.

Q. You spoke especially, in talking off the record, about candy manufacturers with which this respondent was in fierce competition?

A. Yes, sir.

Q. That is true?

A. Yes, sir.

Q. You spoke of letters to the Federal Trade Commission. Have you a copy?

A. Yes, sir.

Q. I would like to see it.

A. Yes, sir.

(Witness produces copy of letter.)

MR. ROWLAND: I will object to that being on the record—letter dated July 12, 1930.

THE WITNESS: I wrote that letter after very, very mature deliberation, so that I go on record exactly how I felt in the matter and I think I have done it in the clearest language possible.

Q. Mr. Sander, you know Mr. Thomas Barnes?

A. Yes, sir.

Q. He is a salesman of the Voneiff-Drayer Company?

A. Yes, sir.

Q. Did you help him write a letter to the Federal Trade Commission?

A. He showed me a letter and I corrected some of his English. The sentences were not clear and I pointed out how he could make it more clear, but I didn't change his testimony.

MR. ROWLAND: I move that be stricken from the record. There is nothing in the record about any letter Mr. Thomas Barnes wrote to the Federal Trade Commission.

(Motion granted.)

Q. If I understood you correctly, there are four caramel manufacturers in the United States and there is only one that makes draw packages and that is the American Caramel Company?

A. Yes, sir, I know of no others.

Q. Have any of the others ever made draw pieces in the past?

A. Not that I know of.

Q. They are old companies?

A. Yes, sir, old companies.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Sander, Mr. Mohun has asked you to let him see a copy of a letter you wrote to the Federal Trade Commission. I hand you the letter and ask you

if that is the original of the letter you wrote to the Federal Trade Commission?

A. Yes, sir.

MR. LANK: Mr. Examiner, I offer this letter as Commission's Exhibit No. 11.

MR. MOHUN: I object to its going in evidence. If the trial Examiner just glances at the letter he will see it is filled with references to matters this witness doesn't have personal knowledge of. The mere fact I referred to the letter in my cross-examination doesn't make it admissible.

MR. LANK: The witness made a statement that it represented his views after mature deliberation.

EXAMINER ALVORD: The objection is sustained. Exception allowed.

BERNARD J. SCHMIDT was thereupon called as a witness, and having been duly sworn by the Referee, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Schmidt, your full name is Bernard J. Schmidt?

A. Yes, sir.

Q. Where do you live?

A. Upper Darby, Pennsylvania. That is right outside of Philadelphia.

Q. In what business are you engaged?

A. Salesman—confectionery salesman.

Q. How long have you been so engaged?

A. Oh, I would say about ten years or close to it.

Q. For what company are you now working?

A. The Voneiff-Drayer Company of Baltimore.

Q. For how long have you been working for them?

A. Over four years.

Q. Do you sell their products exclusively?

A. I have two other small lines—non-conflicting lines.

Q. For what companies are they?

A. One is Allen Smith Company of Richmond and the other is Sun-Ray Sweets, Incorporated, of Philadelphia.

Q. To whom do you sell, Mr. Schmidt.

A. My business almost entirely is to the confectionery jobber.

Q. Do you sell to any retailers?

A. None that are classified as retailers—no.

Q. Do you sell to anybody that does retail?

A. Department stores, yes, but they are not under the retail classification as far as the candy industry is concerned.

Q. Department stores do retail candy?

A. They do a retail candy business but they buy in wholesale quantities.

Q. What states does your territory cover?

A. Part of Pennsylvania; part of Delaware and also New Jersey and what is known as Metropolitan Philadelphia territory.

Q. I call your attention to Commission's Exhibit No. 8 which is a package of candy marked School Days. The testimony shows that package contained 200 small penny pieces of candy together with a number of larger pieces of candy and also a child's school companion and the package also contained what might be termed a display card which is Commission's Exhibit No. 9, showing the method by which that candy is sold and the method by which the larger pieces of candy and the companion are distributed to the public, and ask you if in your business you have come in contact with that type of package?

A. Yes, sir, I have.

Q. Have you also come in contact with that particular assortment—manufactured by R. F. Keppel & Brother?

A. I paid no particular attention to that one box, but I do know the Keppel prizes are sold in my territory.

Q. I also call your attention to Commission's Exhibit No. 1 which bears the label on the front, marked Chocolate Penny Men, 120s and the testimony indicates that that package contained 120 chocolate-coated creams, a few of which contained pennies. I will ask you if you have come in contact with that package?

A. I have not seen that package in my territory.

Q. Have you come in contact with that type of package?

A. That type of package is being sold in my territory.

Q. Do you sell a package similar to either one of those two packages?

A. Yes.

Q. Mr. Voneiff testified, Mr. Schmidt, that at one time they discontinued the manufacture of such a package; were you with them at that time?

A. That must have been when I first came with them, because at that time they asked me not to offer that style of package for sale.

Q. About how long was it you worked for them without offering such a package?

A. Offhand I would say perhaps six months. I don't recall exactly.

Q. At that time did you handle such a package for any other manufacturer?

A. No, I did not.

Q. You said the other lines you handled did not compete with the Voneiff-Drayer package?

A. No.

Q. The Voneiff-Drayer put out what is termed a break and take package?

A. Break and take packages, yes, sir.

Q. If you can, direct your attention to what candy you sell for the Voneiff-Drayer Company. Could you estimate the proportion of their product which is the so-called break and take packages and what might be termed the straight packages?

A. Well, for the present year I would not judge it is over 10 per cent.

Q. Which is over 10 per cent.?

A. The prize package which is not over 10 per cent. Not over that I am certain.

Q. For the previous year what would you say as to the percentage?

A. I was in a different territory in the previous year. I would say perhaps it would come between fifteen and twenty.

Q. What territory were you in?

A. Western Pennsylvania; Western Virginia and Eastern Ohio.

Q. When you handled a prize package or draw package in your line, Mr. Schmidt, could you see any difference in the amount of business you did,—comparing the business you did before you sold a draw package with the business you did after you sold a draw package?

A. That, of course, brings up the early part of my work with them. I would say I had an increase in sales; that is about three and a half years back.

Q. When you sold the draw package?

A. Yes, sir.

Q. Can you give an estimate as to the extent of that increase?

A. No, I could not.

Q. In covering your territory, have you seen these draw packages displayed in the retail stores?

A. Yes, I have.

Q. Have you seen children purchasing from these packages?

A. Surely.

Q. From your observation, who constitute the majority of the purchasers of this candy?

A. Who constitute the majority of the purchasers?

Q. Yes.

A. I would say children up to twelve or thirteen years old—fourteen, perhaps.

Q. Are you opposed to the manufacture of such a package?

(Objected to by Mr. Mohun. I can't see that it makes any difference to this inquiry whether Mr. Schmidt is opposed to it or not.)

(Objection sustained.)

(Exception allowed.)

Q. When you observed these packages on display in the retail stores and observed the purchasers of such packages, was there any preference given to this type of candy over what might be termed straight penny candies?

A. What do you mean: On the part of the purchaser or the display given the package?

Q. Was there any preference shown by the ultimate consumer of the candy? Preference to this type over the straight goods?

A. That would vary.

Q. Do you understand my question?

A. I think I understand your question. You want to know whether the child gives a preference to this class of goods when he makes a purchase?

Q. Yes.

A. At times, yes. Other times, no. I have seen children buy more of the straight line of candy than I have of the prizes.

Q. Do the ultimate purchasers of this type of candy obtain the same value for their money?

A. No, they do not.

Q. Will you explain your answer to that and show in what respect they do not get the same value?

A. The purchase is made on the basis of a selection. I would say, at random, in which there is a color of center to determine the amount they receive, or in some cases I would say a number, or a name.

Q. And the child getting one of the prize-winning names or colors obtains more?

A. They obtain more. They obtain what I guess you would term a premium, an additional piece of candy or a larger piece at any rate.

Q. Before you took on the product of the Voneiff-Drayer Company, were you selling candies—so-called penny lines of candies?

A. Not to any extent. The penny goods business was new to me from the standpoint of selling for the manufacturer, when I went with the Voneiff-Drayer Company.

Q. Is there any difference in the size or quality of your straight penny goods and your break and take pieces? Mr. Schmidt, do you understand the question?

A. O, surely, I understood it. I am trying to think how to answer it in the easiest manner. There is a difference in the size of most of the pieces that are in the break and take packages as against the straight packing. In the break and take, the piece is smaller.

Q. The child buying a penny's worth of break and take and not obtaining a prize, and the child buying a penny's worth of straight goods, doesn't get the same quantity?

A. The straight goods received more value for the penny.

Q. When you first went with Voneiff-Drayer and weren't handling the draw package, Mr. Schmidt, did your trade request such a package?

A. I don't recall.

Q. Did you ask your employer to include such a package in your line?

A. To the best of my knowledge I did.

Q. Why?

A. Most likely because my competitors were selling a good many of that type of package.

Q. Did that interfere with your selling candy?

A. It did not interfere with my selling the other products in my line.

Q. Did it affect your income, their having such a line and your not having such a line?

A. I feel it did.

Q. I believe you testified you saw an increase when you did include it in your line?

A. You asked that question before. I think I said an increase in volume but to what extent I don't recall.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Schmidt, you will recall there was a falling off in the manufacture of draw packages for a while. I don't know about the year. Can you inform me as to that? Manufacturers generally, I think, stopped for a while?

A. I don't know just when that occurred.

Q. But then, if I recall correctly from the testimony, then it was resumed quite generally later?

A. To the best of my knowledge, yes. There was a drop in the sale and I can say within the last two years, more especially in the last year, there had been an increase in the sale of that type of package. Recently in my territory, I have noticed a decided decrease.

Q. Who was the first manufacturer in your knowledge who put pennies in candies?

A. Indeed, I don't recall.

Q. You would not be willing to testify it was not Voneiff-Drayer?

A. That is was not Voneiff-Drayer?

Q. You would not testify that they were not the originators of pennies in candies?

(Objected to as not proper cross-examination.)

(Objection sustained.)

(Exception allowed.)

THE WITNESS: If you will pardon me. When it comes to pennies being in candies, I remember as a very small child trying to get pennies buying that candy.

Q. Voneiff-Drayer does make candy with pennies in?

A. They do, yes.

Q. At this time?

A. Yes.

Q. They have recently introduced punch balls to help them sell their candy?

A. Yes, that type of ball, yes.

THOMAS H. BARNES, was thereupon called as a witness, and having been duly sworn by the Referee, testified as follows:

DIRECT EXAMINATION.

By MR. ROWLAND:

Q. Please state your name, residence and occupation?

A. Thomas H. Barnes; salesman for the Voneiff-Drayer Company; Wilmington, Delaware, is my home.

Q. What business is Voneiff-Drayer Company in?

A. Candy business.

Q. How long have you been connected with that company?

A. Between eight and nine years.

Q. What territory do you cover?

A. At present Eastern Pennsylvania.

Q. None in Delaware?

A. None whatever, any more; I used to.

Q. What trade do you call on? What type of trade?

A. All jobbers—wholesale jobbers.

Q. And what line of goods do you carry. What type of goods?

A. I have a straight line of chocolate penny goods and prize packages—one, two, threes; one to fives and five-cent bars. That is only for them. I represent another firm. Is that necessary?

Q. Yes.

A. C. N. Miller Company of Boston.

Q. Also candy manufacturers?

A. Yes.

Q. What type of goods do you carry for them?

A. One-cent and five-cent candies.

Q. Straight candies?

A. Yes.

Q. Do they make a break and take package?

A. None whatever.

Q. How long have you been representing the Miller Company?

A. Three years.

Q. Do you cover the same territory for them?

A. Identically.

Q. Prior to the time you were with Voneiff-Drayer were you in the candy business?

A. Yes, sir.

Q. What company were you with?

A. W. H. Hollis of Reading and prior to that, Gorton Chocolate Company of New York.

Q. At all times as salesman?

A. Always.

Q. For the Voneiff-Drayer Company you handled a break and take package?

A. Yes, sir, I do.

Q. How long has the company been putting out a type of package similar to that?

A. Similar to that?

Q. I mean that type of package?

A. Let's see—oh, I presume six years. As soon as anybody else ever made one.

Q. Have they manufactured that type of package continuously for the last six years?

A. There has been an interval. We stopped one period, I presume for just around two months. My sales decreased so because of it that I insisted he make them again. I had quite a little influence at that time with him; he was at my home, visiting one week-end, and the following day I went to Baltimore.

Q. When was it that they discontinued?

A. I could not give you the year. I could approximate it or guess at it.

Q. As near as you can give it to us.

A. Between three or four years.

Q. That is for a period of two months?

A. As near as I can recollect.

Q. During the time you were not carrying that type of package did you notice any decline in your sales?

A. That is the reason I insisted on his making it.

Q. Did you have demand from your customers for that type of package during that time?

A. Yes, sir.

Q. Did the fact you were not selling that type of package have any effect on your straight goods to your customers?

A. It surely did.

Q. In what way?

A. Ask that question again.

Q. During the time you were not handling the break and take package, did the sales of your straight goods decline?

A. Yes, sir.

Q. It did?

A. I could not prove that as far as the straight goods decline—it was a general business decline when I didn't have them. I attributed the loss to that break and take package.

Q. Did you sell any customers during the time you didn't have the break and take package that you theretofore sold break and take packages?

A. Yes.

Q. Did any customers stop buying anything from you because you didn't have the break and take package?

A. No.

Q. You didn't have any instance of that?

A. Oh, no.

Q. You say that you took it up with your company to have them begin the distribution of the break and take package again?

A. I did.

Q. And that was because your sales were declining so materially?

A. Terribly.

Q. Do you meet that break and take package in competition?

A. Very much.

Q. Have you ever seen the break and take package which is Commission's Exhibit No. 8?

A. Yes, sir.

Q. Made by the Keppel Company?

A. Yes, sir.

Q. Also Commission's Exhibit No. 4, which is called the One, Two, Three?

A. Yes, sir.

Q. Are you familiar with that package?

A. Yes, sir.

Q. And Commission's Exhibit No. 1?

A. Yes, sir.

Q. You are familiar with that package?

A. Yes, sir.

Q. As between the two types of package you carry of the Voneiff-Drayer Company penny pieces, is there any difference in value of the penny piece of the break and take and the penny piece of the straight line goods, so far as the value the customer gets is concerned?

A. Well, there is in a way. The child who doesn't happen to get a pink center, which is usually the winner, doesn't get quite the value he would if he spent that penny for a piece not in a break and take package.

Q. That is what I want you to elaborate. Just why is there a difference? Is there a difference in size?

A. We try to make the same quality. I was always lead to believe that the value wasn't there unless he was the winner.

Q. Why was the value not there; why was the value not the same in the piece in the break and take package and in the straight line goods?

A. There are so many things to be considered. To make that size piece—the child who got the pink center and an additional bar for his penny and the child that didn't get a pink center simply got the smaller penny piece.

Q. The penny piece in the break and take is smaller than the penny piece in the straight line package?

A. Yes, lighter weight. In the straight package they all get the same size.

Q. In the straight line goods every child gets the same size piece for a penny?

A. Yes.

Q. They are all equal, as far as their value is concerned in the straight piece?

A. Yes. So far as the pieces are concerned; if there are peppermints and nougats—if he picks a peppermint each time they are all alike, or if he picks a nougat each time, they are all the same.

Q. So far as the break and take package is concerned, there is a difference in the value the child gets for one cent, if one gets a prize and one doesn't?

A. Surely.

Q. So that they are not equal on that basis?

A. No, they are not.

Q. Have you ever been in a store—a retail store when children are buying candy of this type?

A. Yes, sir, I have.

Q. Have you ever observed the children buying these pieces of candy?

A. I have.

Q. Have you ever noticed the difference in the demand for break and take and straight penny goods?

A. Considerable.

Q. What is that difference?

A. I noticed it just a week ago. A child came in with five cents and spent four cents on break and take and didn't win anything and spent his other cent on some other piece.

Q. Have you observed that in any other instances?

A. At other times. Yes. I don't come in touch with an awful lot of those things, but I have been in that same store several times and saw same conditions.

Q. Would you say there is a greater demand on the part of children for break and take than there is for the straight goods?

A. I don't know whether I would say it is greater, but great enough to be noticeable when you don't have one. It is a considerable loss to one who don't have them. My own children favor them.

Q. Your own children buy them?

A. Buy them right along.

MR. MOHUN: Mr. Examiner, you understand this general objection of mine prevails? That is the reason I am sitting here so quietly.

Q. In your experience in the candy business and observation as to these two types of package, would you say there is any moral effect in connection with the break and take package, with the children?

MR. MOHUN: Mr. Examiner, I make a particular objection to that. I don't know what he knows about the children.

MR. ROWLAND: He testified he has children of his own.

MR. MOHUN: He is talking about other children now—all the children.

(Objection sustained.)

(Exception allowed.)

Q. Do you think the sale of break and take candy has any effect on the candy business as a whole? On the straight candy sales, we will say?

A. Well, if you don't have one I think you are materially affected in your business.

Q. Has it any effect on the value of the candy, as between the two types, break and take and straight goods candy?

A. No more difference than any one man's grade over another. There are very fine grades in this break and take; lots of very fine bars in them; we for one use the best bars we make—full-sized bars—regulation size a nickel would buy.

Q. Have you ever examined any candies of any manufacturers of break and take, where the candy was inferior?

A. I can't say I ever did.

Q. What proportion of your sales, as between the penny straight goods an the break and take, is the break and take?

A. My percentage now is very low. My firm isn't making a break and take that has been improved on over their former ones. Consequently, I don't have as attractive a package and I don't sell as many.

Q. Have you in the past had larger sales?

A. I estimated in my reply to the Federal Trade Commission, at one time time I thought is equaled 40 per cent.

Q. Is the break and take package ordinarily, as put out by candy manufacturers, a seasonal package—a different type package at different seasons?

A. Yes, their winners are seasonal. That is what makes the attraction.

Q. Does your break and take package have a prize with the last piece?

A. Yes.

Q. Do all of them have such a feature?

A. All that I know of. All have a last piece prize.

Q. That is usually the largest prize, is it?

A. Yes.

Q. Does your package contain a display card for the dealer?

A. Oh, yes.

Q. Is it necessary that a display card be packed in one of these packages in order to apprise the jobber or retail dealer as to how to distribute the package?

A. I wouldn't say so.

Q. You would not?

A. I know of break and takes that don't put them in there and they readily sell.

Q. Do you find the jobbers to whom you sell know the purpose of one of these packages, whether or not there is a display card enclosed?

A. They never ask a question. They haven't for years.

Q. How about the retailer? Do you know anything about the retail end of it, whether they are familiar with the package without a display card?

A. I only know of one instance. Last week a wholesaler delivered a package and the retailer called up to know what were the winners. This package never takes a card; he never packs a card with his package; I told him the winners; the pink and the chocolate in that particular package were the winners. There wasn't any difficulty; I just passed it on over the phone. I happened to be there and knew the package.

Q. In your opinion from your observation in selling this type of package do you think it fosters the gambling spirit in children?

MR. MOHUN: Objected to. This witness is not an expert on what the effect of gambling may be—if you want to call it gambling—it is what he thinks.

(Objection sustained.)

(Exception allowed.)

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Barnes, what was the name of the house in Boston which you said you represented—C. N. Miller Company?

A. Yes, sir.

Q. They handle straight line goods?

A. Yes, sir.

Q. How long did they handle straight line?

A. I don't think they ever handled anything else.

Q. How long have you represented them?

A. Three years.

Q. I think you spoke of representing some one besides C. N. Miller—Voneiff-Drayer?

A. Yes, sir.

Q. May I ask you to refresh your mind as to what per cent. is draw pieces?

A. I could not give it to you.

Q. About?

A. It is quite small; it is practically nothing this year. I sold more in the last two or three weeks than I have sold in a long time.

Q. You referred to being unable to sell draw pieces as the packages you had had to display were not "attractive packages." I think you said something to that effect?

A. Yes.

Q. Of course, dealing in penny candies, and where the market is largely children, it depends a great deal as to how the package is put up and whether it is attractively done or stupidly done?

A. That's right, sir.

RE-DIRECT EXAMINATION.

By MR. ROWLAND:

Q. Mr. Barnes, how many items of candies, different items, do you carry for the Voneiff-Drayer Company?

A. (Witness consults printed list.) Over fifty.

Q. And how many of the C. N. Miller Company?

A. They have possibly fifteen items in their whole line.

Q. Of that approximately sixty-five items of candies, you carry how many items which are break and take?

A. Two.

Q. Only two out of the sixty-five?

A. That is all I have samples of—wait a minute, there are two prizes and One-Two-Threes and One to Five. That is four.

Q. Of the total sixty-five items only four of them are break and take?

A. Yes, sir.

MR. MOHUN: No further cross-examination.

(Adjourned to October 8, 1930, in New York.)

New York, N. Y., October 8, 1930.

Met pursuant to adjournment, 10 A. M.

Before: ELIAS C. ALVORD, Examiner.

Appearances: G. ED. ROWLAND (Washington, D. C.) and HENRY C. LANK (Washington, D. C.), for the Commission;
BARRY MOHUN, for the respondent.

MR. LANK: Are we ready to proceed, Mr. Examiner?

EXAMINER ALVORD: Yes.

JOHN W. TRAUGER, was thereupon called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. What is your full name, Mr. Trauger?

A. John W. Trauger.

Q. Where do you live, Mr. Trauger?

A. In Binghamton, New York.

Q. In what business are you engaged?

A. Manufacturing confectionery.

Q. With what company?

A. The Fair Play Caramels Corporation of Johnson City, New York.

Q. What position do you occupy with that company?

A. General manager.

MR. MOHUN: Excuse me, just a minute. Is it agreeable to counsel and the Trial Examiner that my objection to testimony given by this witness will be the same as stated in Philadelphia on October 6, 1930, and will be considered as incorporated here, and exceptions noted and so on, as was provided in that objection?

EXAMINER ALVORD: Yes.

Q. What position do you occupy with that company, Mr. Trauger?

A. General manager.

Q. How long have you occupied that position?

A. For ten years.

Q. How long have you been connected with that company?

A. Ten years.

Q. How long have you been engaged in the candy business yourself?

A. Ten years.

Q. What type of candy does the Fair Play Caramels Company manufacture?

A. Caramels.

Q. And do they sell by the pound or by the piece or what is the nature of package that you manufacture?

A. Practically all of it is sold in so-called count, by which is meant the packages contain 100 or 200 or 120 or 240 and sold as a unit package. In addition to that, we make goods that are sold for five cents, a bar for five cents, and in addition to that other goods which are sold by the pound.

Q. The majority of your business, you say, is sold by the count or five-cent package?

A. By the count or five-cent package.

Q. By the count, does that mean that it gets to the ultimate consumer—when it gets to the ultimate consumer, that he buys it by the piece or by the package?

A. He buys it either one for one cent, three for one cent, two for one cent, and so forth.

Q. And with regard to the five-cent package, how does the ultimate consumer purchase that?

A. The ultimate consumer buys one package for five cents.

Q. How do you sell your candy, Mr. Trauger, to the retailers or the wholesalers, or what method do you use?

A. To the wholesalers.

Q. What method do you use to sell the wholesalers?

A. What method?

Q. Yes.

A. We have our salesmen covering the various parts of the country, who visit the wholesalers and sell them the goods.

Q. What territory do you cover in the sale of your goods?

A. All of the United States.

Q. And ship most of your goods from Johnson City, New York?

A. All of it.

Q. Mr. Trauger, I show you a box marked Commission's Exhibit No. 1, which is labeled on the front "Chocolate Penny Men," if I am not mistaken "120-s" and I show you a package marked Commission's Exhibit No. 4, "1, 2, 3, Big Chief," and I show you Commission's Exhibit No. 8, which is marked on the end "School Days 200-s." I think that all of those packages will identify themselves in your mind with the possible exception of No. 8. The testimony showed that that contained 200 penny chocolate cream together with several larger pieces of candy, and a child's school companion.

I will ask you if you are familiar with that type of package?

A. I have never seen those, but I have seen that type of package.

Q. They are what you term pick and takes or break and takes?

A. They are.

Q. Did you manufacture a package similar to any of those packages?

A. No, we do not.

Q. Do you manufacture any break and take or pick and take packages?

A. We do not.

Q. Does your product come in competition with this type of package?

A. In so far as all so-called penny items come in competition with each other.

Q. You said you did not manufacture such a package?

A. No, we do not.

Q. Why do you not manufacture that kind of package?

A. There have been a number of reasons why we never choose to manufacture. We have never considered it, first of all, proper to offer to the youngster something that involved the element of chance, because we felt that in spending his money he would not consider the value he was buying so much as the possibility that he would get something more than he was paying for inducing the element of gambling and take the merchandising of goods off the plane of real merit.

Probably that was our primary reason. We felt that you could never build up a substantial, growing and consistent business on anything that is built on the matter of chance, you would be obliged to change those things all the time.

We knew that it was illegal in certain areas to put out those things, trying to sell those things. We do not want to start something we know was against the

laws of various municipalities and probably some States.

We did not know much about the details of those laws but we knew there was some——

MR. MOHUN: Mr. Examiner, I move the answer be stricken; it is largely opinion, more or less of a lecture on morals. The fact that this gentleman's company does not make any so-called take and break or draw candies speaks for itself. I cannot see that his motives are any part of the proper record in this case. He does not manufacture them and that fact ends it. I cannot see how it can possibly bear on the issue in this case as to what motives actuated him, whether it might teach children or encourage children to gamble, as he calls it, and I move that it be stricken.

MR. LANK: If your Honor please, I think the fact that he does not manufacture them and his reasons why will show that it is an unfair method of putting out these packages and that the only way of showing that it is an unfair method and why this manufacturer does not put them out——

MR. MOHUN: Of course——

MR. LANK: To show that it is an unfair method we have to go to those who do it and those who do not do it and see what the ultimate effect is and see what their reasons for not doing it are in not putting out those packages.

MR. MOHUN: Those that do and those that do not, in my opinion——

MR. LANK: Naturally, one of the best ways of arriving at an unfair method, if it is unfair, and we intend to show that it is unfair, is that by that kind of testimony.

EXAMINER ALVORD: The motion is granted.

MR. LANK: Will your Honor allow me an exception?

EXAMINER ALVORD: Certainly.

MR. LANK: I——

MR. MOHUN: In view of the granting of the motion——

MR. LANK: I also reserve the right to again offer that same testimony later after I have asked this witness one or two more questions.

EXAMINER ALVORD: I will rule on it then.

MR. LANK: Yes.

Q. Do you know from your experience the effect on your business—strike that question. Does the manufacture and distribution of this type of package affect the sale of your products?

A. We have felt that it does.

Q. In what way does it affect your business?

A. Our salesmen tell us——

MR. MOHUN: I object to that. Please do not answer that.

MR. LANK: Mr. Examiner, I think this witness, who is general manager of the Fair Play Caramel Company, and I intend to develop that these salesmen make their reports to him as such general manager and in the usual course of his business and in his official capacity as general manager of the company, and I think then and in that event those statements are admissible as affecting—showing the reasons and the method of affecting his business.

MR. MOHUN: If the Court please, obviously a report made by a salesman to his chief, the present witness, is not admissible here. Any conclusion which this witness or his company came to

as a result of these reports or other information gathered from various sources in his business experience, he might testify in respect of the action of his company, but clearly not as to what a particular person told him which was one factor out of probably a great many others which caused this witness to refrain from——

EXAMINER ALVORD: I believe that is a correct statement of the law, so far as this testimony is concerned.

MR. LANK: I think my question——

EXAMINER ALVORD: Pardon me a moment. The witness may state what he has learned in the usual course of his business, from information which came to him from any source, but it would be improper for him to testify as to what any specific person stated to him.

There is no possibility of counsel cross-examining on that kind of testimony.

By MR. LANK:

Q. I think my question was, what effect does it have on your business. Will you endeavor to answer that question?

A. We felt that it has reduced our sales to some degree.

Q. Does it affect your business generally or just in particular territories?

A. So far as we have knowledge, in particular territories.

Q. Have you had any reason for refusing to meet that competition by the manufacture of such a package?

A. Yes.

Q. What is that reason?

A. In the first place, we do not want to contravent existing laws in certain areas. In the second place,

we do not want to attempt to build up a line of goods which we knew would not develop into permanent business and could not, and, in the third place, we consistently held that it was not good business to ask our ultimate consumer to gamble his money on values he would not otherwise get. In other words, we could not offer to the consumer consistent values as he attempted to purchase our goods if we made that.

Q. By that what do you mean, what do you mean by that last remark, Mr. Trauger?

A. If, for instance, we offered the ultimate consumer a piece of candy for a penny or two pieces of candy for a penny——

Q. If you can use as an illustration one piece for a penny, will you stick to that?

A. It works either way. If we could offer you one piece for a penny, we chose, as manufacturers, to give you the maximum value we could for that penny. If in the construction of our package we must include picks and draws, which means that the total package must have the same general market value as the package without the picks and draws, therefore the individual sales made by your penny must be of necessity less than that candy when the full value is put into each sale. In other words, the drawing of a bar or additional value of certain purchases must be included in the original cost of the package and the individual pieces, then, that you purchase for a penny are never as valuable as the individual pieces which can be offered him if the total value of the package is separate —I mean is spread over into every piece that is made or put into it.

Q. Have you ever had any request from your various traveling salesmen to manufacture such a package?

A. Yes, sir.

Q. And your testimony that you have not done it shows that you have not acceded to those requests?

A. We did not accede to their requests.

Q. Your reason being that you have already given?

A. Exactly.

Q. In your opinion as a manufacturer of candy, Mr. Trauger, do you believe that the manufacture and distribution of this type of package is beneficial to the candy industry or detrimental to the candy industry?

Mr. Mohun: I object, if your Honor please. This man is not testifying as an expert. The actions speak for themselves but he has not shown that he is qualified to answer such a question by being thoroughly proficient in the candy business in the United States. He has been in the candy business but ten years as his direct testimony shows. He has shown himself that it is good business, in his opinion, not to go into the manufacture of these pick and draw pieces. I do not see that he is qualified to testify as to whether it is good business for some other concern to go into it or not.

Obviously he is not qualified to answer such a question, and besides, such a question is clearly hypothetical.

The records of the United States show who was in the business and who is not; what has this man's opinion got to do with it?

Examiner Alvord: I am inclined to think that the witness is qualified to answer that question, but I do not think that that conclusion is a subject for expert testimony. If such a conclusion can be reached at all, it ought to be reached by the facts testified to. Objection sustained.

Q. Mr. Trauger, in considering the value which the ultimate consumer gets, according to your example, for his one-cent purchase, have you in your business

ever come in contact with the so-called pick and take or draw and take, where the quality as well as the quantity showed that the purchaser was not getting his value?

A. Yes.

MR. MOHUN: That is obviously a leading question, but he has answered it and I suppose it will have to stand.

EXAMINER ALVORD: Yes, but do not lead your witness.

MR. LANK: That is all I have, I think. You may inquire.

MR. MOHUN: Mr. Rowland, have you any questions?

MR. ROWLAND: No.

MR. MOHUN: I have just a question or two.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Trauger, you spoke of selling your caramels in competition with pick and take or draw and take, that it had, to use your own language, "reduced sales to some degree." I take it that it is correct to state that you did not prove with mathematical certainty or with any other degree of certainty, that it reduced sales to some extent, but that is your opinion, that it did reduce sales to some extent when you came into competition with draw candy, is that correct?

A. I think that is a correct statement.

Q. Your company has made some money, has it not?

A. Yes, sir.

Q. It made money during the past five years?

A. Yes, sir.

Q. At an increasing rate each year or fluctuating?

A. No fluctuating.

Q. I presume the depression has affected the business of your company?

A. It has in volume and profits both.

Q. It naturally would?

A. Yes.

Q. But you always made a fair return on your investment?

A. We did.

MR. MOHUN: That is all.

MR. LANK: That is all, Mr. Trauger.

(Witness excused.)

MARSTON ABERCROMBIE, was thereupon called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Abercrombie, your full name is Marston Abercrombie?

A. Marston Abercrombie; yes, sir.

Q. And are you connected with any candy company?

A. Henry Heide, Inc., yes, sir.

Q. How long have you been connected with that concern?

A. A little over a year.

Q. In what capacity are you now connected?

A. Assistant sales and advertising manager.

Q. Prior to that time were you engaged in the candy industry at all?

A. Yes, sir.

Q. In what capacity and with whom?

A. Sales and advertising manager.

Q. For whom?

A. Peerless Confections, Chicago.

Q. For how long were you connected with them?

A. About two years.

Q. Prior to that were you connected with the candy industry?

A. Yes, sir.

Q. With what company and in what capacity?

A. Beinhauer Brothers, New York, for about six years.

Q. In what capacity?

A. Sales and advertising manager.

Q. Does that cover your experience in the candy industry?

A. My entire candy experience; yes, sir.

Q. What type of candy does Henry Heide, Inc., manufacture? And distribute to the trade?

A. A general line.

Q. Does that include what you term penny goods?

A. Yes, sir; a very large line of penny goods.

Q. About what proportion of your business is penny goods, can you say? Generally, I do not want it in any detail.

A. I should say about 60 per cent.

Q. In what territory do they sell their candy?

A. The world.

Q. What is their method of distribution?

A. Through salesmen and jobbers who sell to the retail trade.

Q. I call your attention to Commission's Exhibit No. 1, which is marked on the end, "Chocolate Penny Men 120-s," and to Commission's Exhibit No. 4, which is marked on the end "1, 2, 3, Big Chief, 60-s," and to Commission's Exhibit No. 8 marked "School Days 200-s." Do those labels explain themselves to you, Mr. Abercrombie, as to the nature of the package?

A. The middle one does, the top one and the bottom one do not.

MR. LANK: The middle one referred to was Exhibit No. 4.

THE WITNESS: One, two, three, Big Chief 60-s.

Q. The one marked "Big Chief" are what might be termed a three-cent bar wrapped in paper with a little ticket or card inside of each wrapper, but not exposed to the view of the proposed purchaser. Those tickets had on them one-cent or they had on them "two cents" or they had on them "three cents" and the testimony was that the ultimate purchaser paid that price,—paid such prices as the ticket stated——

A. Yes, sir.

Q. Commission's Exhibit No. 8, which is marked "School Days 200-s," the testimony shows that that package contained 200 penny chocolate creams, together with a number of larger pieces of candy and a child's school companion, and that the larger pieces of candy and the school companion were distributed to the ultimate consumer, according to the color of the center, either white or pink or to the purchaser of the last penny piece in the package.

I will ask you if, in your business, you have come in contact with that type of package, Mr. Abercrombie?

A. I have.

Q. Have you manufactured such a package?

A. We do not.

Q. Has the manufacture and distribution of that type of package affected the business of your company?

MR. MOHUN: Now, I desire this witness to be cautioned that he must testify only as to facts within his knowledge in answering this question and refrain from expressing an opinion.

MR. LANK: I will ask that that caution also contain that he can state what he knows as a result

of what his employees or the employees of the company have advised him and of the knowledge he has derived from that source, but admitting that he cannot testify as to what someone told him.

EXAMINER ALVORD: The witness, in answering this question, will confine himself to knowledge which he has acquired in the usual course of his business from any source without attempting to detail what any salesman or anybody else has told him.

A. The sale of picks, or rather packages of that type has decreased the sale of penny goods in general. Therefore this has decreased the sale of Heide's penny goods.

Q. Can you give any estimate of the extent of that decrease?

A. It would only be an estimate.

Q. I see.

A. I do not know how correct it would be. Any——

MR. LANK: I will not insist on that.

MR. MOHUN: Let the witness finish, he is doing very well.

EXAMINER ALVORD: Yes. Have you finished your answer

A. (Continued.) Well, I would, just as a stab, I would say between 15 and 30 per cent. Please remember that that is only an estimate.

Q. In view of that statement, I presume that there is competition between that type of package and your penny goods, Mr. Abercrombie?

A. There is.

Q. In meeting that competition, have you—no. Your testimony would indicate that you have not manufactured such a package in order to meet competition?

A. We have not.

Q. What are your reasons, if any, for not manufacturing such a package?

A. In our opinion, packages of that type are both unethical and illegal. Henry Heide, Incorporated, would not do anything that was either illegal or unethical. I believe packages of that type are contrary to the laws of numerous states and municipalities. Henry Heide would not do anything that is contrary to the laws of states and municipalities. I do not believe that packages of that type will help the candy business. Generally speaking, if I can give general testimony on it, the sale of picks is a once-over proposition, the jobber gets something else and he is looking out for something else; there is no such thing, I do not think, as building up a permanent business on a pick.

By Mr. Mohun:

Q. Are you through?

A. I can stop any time.

Mr. Mohun: I move that the answer, the entire answer be stricken; he is not only stating the reasons but he is expressing an opinion as to what the laws of other states provide, and that is not the way of proving the laws of other states. I think he is misinformed, but that is immaterial, about whether Heide prefers to conduct business along certain lines that are considered strictly ethical or not. I cannot see it has any bearing on the issue in this case.

Examiner Alvord: The answer, so far as it attempts to indicate what the laws of the various states in which the witness' company does business may be stricken. If it is material to prove what the laws of those states are, that is not the way to do it.

The reasons which the witness has stated for not manufacturing and distributing packages similar to those in evidence may stand.

By Mr. Lank:

Q. Mr. Abercrombie, have you examined any packages similar to Commission's Exhibits 1, 4 or 8, examined the contents of any packages similar to those?

A. I have.

Q. Distinguishing between so-called straight sales, by that do you understand what I mean, by straight merchandise and so-called pick-and take merchandise; is there any difference in value as to the ultimate consumer in the two packages?

A. Yes, there is.

Q. Will you explain that difference?

A. Because the majority of the people, or, I should say, children, because children are the purchasers largely of picks, do not get their penny's worth, the minority win.

Q. And in that difference in value does it refer to quantity or quality or to both?

A. I am referring primarily to quantity. Quality is a thing that is hard to specify or describe. I can give you my personal opinion of the quality of the picks that are on the market, but that is not flattering, and I do not imagine a personal opinion is wanted.

Q. Have you had any requests from your salesmen to furnish them with such a package?

A. No, we have not, because our salesmen know better than to even pass such a request to a house like Henry Heide, Incorporated. We have had requests from jobbers which have been turned down, although I can—I do not recall any specific instances.

Mr. Lank: That is all I have.

Mr. Rowland: I have a question or two to ask Mr. Abercrombie.

By Mr. Rowland:

Q. You say, Mr. Abercrombie, that there is a difference in value to the ultimate consumer between a penny

piece of a pick and take package, and a penny piece of straight goods such as yours?

A. Yes, sir.

Q. That difference in value, you said, is in favor of your goods, in other words, you get more value for the straight than for the break and take piece goods?

A. Yes, sir.

Q. Does the fact that there is a difference in value between those two types of merchandise have any effect on the sales of the straight package?

A. Have any difference in the effect of the sales of the straight package?

Q. Of the straight goods, yes, such as your goods, that is straight penny candy, without any prize or anything of that sort, and the fact that there is a difference in value?

A. I would say,—I do not know whether I am answering this question exactly,—well, I would say that the gambling instinct in children is even stronger than reason. Reason would prompt them to take the better value for every penny that they spend, but the gambling instinct prompts them to try to get something for nothing.

Q. And the fact that there are those packages offered for sale, side by side with the straight package similar to yours, would have an effect on the sales of certain packages, would they not?

A. Yes, indeed it does.

Q. And you have found that to be the case in your business, have you?

A. I have found that to be the case.

Q. And to that extent the sale of this type of package has a deleterious effect on the sales of those manufacturers who do not put them out——

A. Yes, sir.

Q. But who usually confine themselves to straight goods, isn't that so?

A. Yes, sir.

MR. ROWLAND: That is all.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. How long have you been in the candy business? You testified but I overlooked it.

A. About approximately fifteen or sixteen years.

Q. That would take you back to about 1915 or 1914?

A. About that, I think it is.

Q. Are you aware of the fact that candies were sold with the aid of punch boards as far back as 1907?

A. I was not in the candy business in 1907.

Q. I did not ask you whether you were in the candy business. I ask you if you were aware of the fact that as far back as 1907 candies were sold with the aid of punch boards?

A. No, sir.

Q. When did you first hear of this method or when did it first begin?

A. Punch boards or picks, sir?

Q. Either.

A. Punch boards have been in existence for,—to my knowledge, for quite a number of years. Frankly, I could not place the time when I first saw them.

Q. You mean in connection with the sale of candy?

A. In connection with the sale of candy.

Q. Do you mean by quite a number of years five years, ten years, twenty years?

A. Five, ten, fifteen years. I really could not possibly put my finger on any approximate time at which I first saw punch boards,—or saw candy being offered with punch boards.

Q. So you are not willing to testify that it was done twenty years ago?

A. I know it has been done for a long time, but it would just be a pure guess, that is all.

Q. Now, what about your knowledge in respect to so-called draw candies or put and take, when, to your knowledge, was that first inaugurated?

A. The first time I noticed it was about two years ago, I should say.

Q. You had heard of it before, of course, had you not?

A. No.

Q. You have been in the candy business for sixteen years?

A. Yes, sir.

Q. And you first heard of draw chances or something of that kind, not to exceed two years ago?

A. Approximately two years ago.

Q. And your market is the world?

A. It is.

Q. Your position, I think, is assistant sales manager and advertising manager, is that correct?

A. Yes, sir.

Q. Was your company ever a member of the National Confectioners Association or if that name is not correct, the national organization of candy manufacturers?

A. The National Confectioners Association it is.

Q. How long has it been a member of that?

A. To my direct knowledge, eight years, but for considerably more than that, though.

Q. Has any officer of your company been on the board of directors or whatever the governing board may be known as, of the National Confectioners Association, or held any office in that association during the time that it has been a member of it?

A. Yes.

Q. What office, please, and by whom held?

A. Mr. William F. Heide was, I believe, for one year, president of the National Confectioners Association.

Q. What year, please, if you can tell?

A. I should say two or three years ago.

Q. Any other?

A. I believe Mr. Herman Heide some years ago held some office in the National Confectioners Association. I believe Mr. Henry Heide, Sr., quite a number of years ago, held an office.

Q. How many Heides have you mentioned, three or two?

A. I have mentioned three.

Q. They have held offices, those three members of your corporation?

A. Yes.

Q. They have also been on the board of governors, or whatever it is called, of that association?

A. Well, Mr. William F. Heide was president, presumably, if such a board existed, he was on it, but I do not know.

Q. You do not know?

A. No.

Q. To what were you referring, then, Mr. Abercrombie, when you said as a result of competition with this so-called draw candy, it caused a decrease in your sales, which amounted, insofar as you could state, to between 15 and 30 per cent.?

A. I believe my figures were that that did not apply to the sales of Henry Heide, Inc., but to the sales of penny candy generally.

Q. Oh, it did not refer to Heide?

A. I said that it had decreased, I believe, the line of penny candy generally between 15 and 30 per cent., but that was only a guess.

Q. Yes, I understood. Let us confine ourselves to what your estimate might be on Heide, only your estimate of your own company, would it be more accurate than the trade generally?

A. I would not be in a position to estimate how it affected our sales on penny goods.

Q. At any time?

A. At any time.

Q. But you estimated it was from 15 to 30 per cent. generally in the trade?

A. Yes, sir.

Q. As compared with what, 15 or 30 per cent. of what?

A. Of the total sale of penny goods.

Q. Let us see. What period are you comparing it to, before there were any pick and draw candies?

A. No, what they might have been without them. Remember that that figure I gave rather reluctantly because it is more or less of an estimate, a guess and a wild guess, that is all. I do not think that anybody could guess accurately on it.

Q. But when you spoke of any percentage, 15 to 30 per cent,. when you apply that to any period at all, there must be 100 per cent.; what is your 100 per cent.?

A. The line of penny candy that would have been done were it not for the offer of the prizes.

Q. In other words, if the straight goods had the field all along——

A. Yes, sir.

Q. They would have sold——

A. 100 per cent., instead of between 70 and 85, but that is only an estimate.

Q. So your testimony, if I understand you correctly—now, of course, somebody else is going to read this who has to understand it as it is typewritten—here we have a field of the straight goods, the straight penny goods—let us confine ourselves to that—and it

is all serene and they are selling 100 per cent., of course?

A. Yes, sir.

Q. Now comes along a man who manufactures picks and draws. He would divert, I understand, the field which was previously 100 per cent. to the extent of 15 to 30 per cent.?

A. Yes, sir.

Q. I do not wonder you were careful in saying that that was a mere estimate, underscoring "mere" —I mean accentuating "mere." If any manufacturer came into existence, regardless of whether he sold picks and draws, he would get a certain percentage of the business, would he not?

A. Naturally, but the amount of penny goods sold would still be 100 per cent.

Q. The matter of penny goods——

A. Yes, sir.

Q. The straight penny goods would be 100 per cent.?

A. Yes, sir.

Q. But there is nothing in the books of your company which help you in arriving at 15 to 30 per cent., is there?

A. Absolutely nothing, no, sir.

Q. Did I understand you to say that from 15 to 30 per cent. of the penny goods manufactured are pick and draw?

A. Only a guess, that is what I said. As I said, I have absolutely nothing to base those figures on.

Q. So the use of the word by you "decreased our sales" up to the extent of 15 to 30 per cent., the word "decreased" was not properly used there at all?

A. I think I said 15 to 30 per cent. of the total sales of penny goods.

Q. Of penny goods?

A. Yes, sir.

Q. But it was not proper language to use the word "decreased" at all, was it?

MR. LANK: I object to that. I think the attorney is now arguing with the witness, and I object to that line of examination.

MR. MOHUN: Will you indulge me a little bit——

EXAMINER ALVORD: The objection is overruled.

Q. What I am trying to do, and what I want to do, is to get the absolute truth as near as you can give it for the benefit of the Commission, isn't that true?

A. Absolutely, sir.

Q. I am not antagonistic to you, my dear sir.

A. I am trying to help you, I want to help everybody here. We are not antagonistic to anybody, I am here merely for the sake of clarifying the situation.

Q. So you are not willing to have your testimony understood that the use of pick and draw boxes decreased what would otherwise be, in your words, your legitimate market, that is not the meaning of your testimony, is it?

A. That the decrease of sales of the legitimate penny candy——

Q. Yes.

A. Yes, it is.

Q. But you say your books would show nothing of that sort and it is a mere guess?

A. And I said I could not prove it.

Q. You could not prove it?

A. No.

Q. And I still ask you to—I still afford you opportunity to state that the word "decreased" was not the right word for you to use, because you are not comparing it to any other fixed sum.

A. I was comparing it with what I thought the total might be——

Q. Yes.

A. Which is purely an imaginative figure just as the 15 to 30 per cent. is just a guess.

MR. MOHUN: You have been very helpful.

Q. When you were speaking, Mr. Abercrombie, of the difference in value between straight goods and draw pound candies, were you speaking of any particular goods manufactured—I mean any goods manufactured by a particular manufacturer or speaking generally?

A. Generally, sir. I am not speaking about any goods manufactured by any particular manufacturer. These goods here have been described to me and I have never seen them.

Q. So if I tell you that it has been testified in this case that one pound of Keppel & Company's candy had been sold as straight goods of a certain quality and one pound of your pick and draw candies of the same quality sold at the same price—one brought the manufacturer the same amount of money, in other words, that the two packages, the straight goods on the one hand selling in the market and the pick and draw goods on the other hand selling in the market at the same rate, that the purchaser of each, assuming now that he took the whole box which gave just as much value as the purchaser of the other box, I say if I had told you that it had been testified in this case, you are in no position to deny that, are you?

A. No.

MR. LANK: Just a minute that question——

Q. What do you mean——

MR. LANK: Just a minute, I want to see what you are including in that when you stated that the

testimony—when you say that the box contained, for example, one pound, that that one pound also includes the so-called prize candies in the package as well as the pieces that were actually purchased or that the pound box, I think, for example, was, where the testimony did refer to it, was the one, two and three, and then if he bought the whole box, he would still get the same value, what I mean is, that if you put a three-cent pack piece in the box, that the box that had the three-cent piece in each one, that he would not be getting nine cents value.

MR. MOHUN: I desire on record to thank Mr. Lank for that correction. I had that in mind and I thought you had it in mind, I meant an average box of pick and draw as Mr. Lank has pointed out, the average box including the same pieces and an equivalent weight and the straight candies, would the manufacturer get the same amount of money therefore if he sold it and if sold at the same price to the public, would you say that you were in a position to controvert that testimony?

THE WITNESS: No, I am not.

MR. MOHUN: I am sorry, Mr. Lank, I did not mean to mislead him, you know that. I think that is all, Mr. Abercrombie.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Abercrombie, has the sale of pick and take packages affected the sale of Henry Heide's straight candies, straight penny goods, to use Mr. Mohun's word and your word, the legitimate candy goods?

MR. MOHUN: Not my word, I say it was his word. I did not adopt that legitimate or illegitimate.

A. I did not use it. I would say yes, but I cannot prove it.

Q. By that do you mean you cannot prove the extent or you cannot prove that it had affected the business?

A. I cannot prove either.

Q. I do not want you to repeat what any of your salesmen have told you, but have your salesmen ever reported losses of sales by failure—I will kill that question.

You have testified to that. But as assistant sales manager, do I understand your testimony to be that it has affected your business but you cannot prove the extent or the—yes, you cannot prove the extent of it.

MR. MOHUN: I object to that. The witness has just testified that he could not say that there had been any adverse effect as a result of the sale of pick and draw pieces.

Now, counsel——

MR. LANK: Just a minute. You have misquoted the witness again, Mr. Mohun, he said it has affected it but he cannot prove it——

MR. MOHUN: I beg your pardon. Let the stenographer go back and read it. I think I paid very close attention to that. You are attempting to impeach this witness now unless I am very much mistaken.

EXAMINER ALVORD: Read that question.

(The question was thereupon repeated by the reporter as above recorded.)

MR. MOHUN: Now, counsel is putting in this witness's mouth, implying that he can prove the fact that losses had been sustained when the evidence is that he could not prove it. Now, he is impeaching this witness or attempting to, his own witness.

EXAMINER ALVORD: Read that question to me again. I do not get that idea very well and I would like to hear it.

(The question was thereupon repeated by the reporter, as above recorded.)

MR. MOHUN: Now, judge, we are not going to gloss over this because that is important and we want to get to the bottom of it. He said he could not prove either the extent or the fact that it had affected Heide's business, isn't that correct, sir—I am not asking you a question. It is not my turn, I beg your pardon.

Now, that is there, it is on the record, and he said he could not prove either the fact that it did affect the business or if it did affect the business, the extent of that, he could not prove either of them.

Now, he asks this question——

MR. LANK: Suppose we let the witness answer the question and clear up——

EXAMINER ALVORD: Just a minute, there is a great deal of this talk that has no place in the record and should be stricken out, and I am going to direct the stenographer to strike it out physically when he transcribes this record, all this talk between counsel.

MR. MOHUN: That is all right.

EXAMINER ALVORD: It has no place in the record. If the witness desires to explain his testimony in which he said substantially that he could not prove the extent or the fact of an adverse effect upon the sale of his company's penny goods by the sale of the pick and take package, he might say so in answering this question.

To that extent, the objection is overruled.

MR. MOHUN: I ask, then, to note an exception to that, because clearly counsel is attempting to impeach his own witness.

EXAMINER ALVORD: I see nothing in that question or in the possible answer of the witness which would tend in any manner to impeach him or tend to impeach him.

MR. MOHUN: Let us have the question again and maybe I will withdraw the objection.

(The question was thereupon again repeated by the reporter as above recorded.)

MR. MOHUN: That is a very leading question and putting into the mouth of this witness something he has not said.

MR. LANK: I withdraw the question.

EXAMINER ALVORD: If you object to it on the ground that it is leading, I will sustain it.

MR. LANK: I will withdraw the question.

By MR. LANK:

Q. You testified that it did affect your business, but you could not prove it——

MR. MOHUN: I object to that——

Q. Will you explain that answer just a bit, if you can explain it?

A. Yes, my work is partly in the office and partly out on the road and during the last five weeks I spent four of them on the road working with various salesmen in various territories, south as far as Florida, west as far as Iowa. During that time I have talked with jobbers, I have heard jobbers say that they——

MR. MOHUN: I object to this, what the jobbers said.

EXAMINER ALVORD: It is not necessary for you nor proper for you to repeat what the jobbers or

anybody else told you. Are there any facts as you learned them in the course of your business from any source—what I mean by that is, that what a jobber—this is off the record, this part of it.

(Discussion off the record.)

A. In soliciting business from jobbers with our salesmen in the various parts of the country, jobbers have claimed that the sale of picks has decreased their sale of penny goods.

Q. Was that reflected in the orders which they placed with you when you called on them with your traveling salesman?

A. In a great many instances, yes.

Q. Have you ever been in a retail store where picks—the so-called pick packages—I will call them the so-called draw packages were displayed alongside of straight goods?

A. Yes, sir.

Q. Have you been there when purchases were being made—withdraw that question. Was that retail store near a school?

MR. MOHUN: What retail store?

MR. LANK: He said he had been in one.

A. The particular store that I had in mind was not near a school.

Q. Were there a number of children buying those candies at the time you were in there?

A. At the particular one I had in mind, no one.

MR. LANK: That is all, I think.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Abercrombie, the chain stores are quite an important factor in the candy business? I do not mean

necessarily the penny candies, but the five-cent bars which they sell, for example, three for a dime, some do that, I know, has that affected the sale of penny candies —that has affected the sale of penny candies indirectly, has it not, the chain store factor?

A. The chain stores have, yes.

Q. Now, your experience on the road is confined to the last two years, is it not?

A. No, I have been out on the road before that.

Q. I misunderstood you——

A. The specific period that I mentioned in my testimony was the last five weeks.

MR. MOHUN: Yes, I understood that.

THE WITNESS: That was all.

MR. MOHUN: That is all I have.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Just one thing I forgot to ask. You said that it affected your business and you said that it was reflected in the orders. I did not ask you what effect it had had, whether it increased or decreased business or increased or decreased the orders.

A. The effect was a decrease in the orders.

MR. LANK: I thought that would be presumed.

Q. Do you sell chain stores, Mr. Abercrombie?

A. Some of them; yes, sir.

MR. LANK: That is all.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. Would you tell me whether your testimony is to the effect, first, that you are able to prove by your testimony under oath, as you are here, that these pick and draw candies has affected your business or not,

and before you answer that question, I want to add that you testified that it had adversely affected your business but you could not prove it?

A. Yes, sir.

Q. Nor could you prove the fact that it had affected your business at all, in other words, you have two propositions before you, the first proposition was that that had the appearance of the pick and draw candies had an adverse effect on your business and your response to that was in your opinion—you did not use the word, but you felt that it had, but you properly safeguarded that response by saying that you could not prove it?

A. Yes, sir.

Q. The second proposition was whether it had affected your business at all and you could not prove the extent that it had affected your business at all?

A. No.

Q. Your response was, in effect, that you thought it had but you could not prove that, is that testimony correct?

A. That is correct, sir.

MR. MOHUN: That is all.

MR. LANK: I have no further direct examination.

(Witness excused.)

DANIEL D. SANFORD, was thereupon called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Sanford, your name is Daniel D. Sanford?

A. That is right.

Q. You are president of the National Licorice Company?

A. I am.

Q. You are here under—in response to a subpœna issued by the Federal Trade Commission?

A. I am.

Q. How long have you been president of the National Licorice Company?

A. It will be two years in January.

Q. How long have you been connected with that company and in what capacity?

A. Twenty-eight years. I have been office manager, assistant secretary, assistant treasurer, treasurer and president.

Q. Where is that company located, Mr. Sanford?

A. Its principal office is in Brooklyn, New York.

Q. What is the address?

A. 106 John Street; we also have branch factories.

Q. In what business are they engaged?

A. Manufacturer of licorice and licorice specialties, licorice confections.

Q. Directing your attention to the manufacture and sale of penny goods, is your concern engaged in the manufacture of such type of goods?

A. In large quantities and for many years.

Q. Where do you sell your product?

A. All over the United States and Canada, export.

Q. I call your attention to Commission's Exhibit No. 1, which is marked on the end "Chocolate Penny Men, 120," also to Commission's Exhibit 4 which is marked on the end "1, 2, 3, Big Chief 60's," and to "School Days 200's," which is Commission's Exhibit No. 8.

I will ask you if you are familiar with those types of packages?

A. Not with those individual packages.

Q. Not with that type of package?

A. May I see the goods in there?

Q. Yes, I will—there is not a great deal of goods in them. The first one I referred to was the Chocolate Penny Men 120's and the testimony shows that there was 120 of those in the package and a number of them contained, within the piece of candy pennies——

A. Contained what?

Q. Pennies.

A. Pennies in the candy.

Q. Within the candy, right in the candies, I think that is what the testimony was.

A. I would not say that I have seen them; I have heard of them.

Q. Directing your attention to Commission's Exhibit 4, which is marked "1, 2, 3, Big Chief," the testimony was that they were all wrapped—that package contained a wrapped bar of candy and within the wrapper but not so that the ultimate purchaser could see the figures thereon were tickets bearing the numbers of one cent, two cents and three cents, that those tickets were—I mean the amount of those tickets was the price which the ultimate purchaser paid for the piece of candy.

I show you Commission's Exhibit 6 which has on it three of the tickets——

A. I would say that I am not familiar with that particular package, but I know of the system.

Q. You are familiar with that type of package?

A. That type of package, but not with that particular one.

Q. Commission's Exhibit 8, which is marked "School Days," contained 200 penny chocolate creams and also contained a number of larger pieces of candy and a school companion, a child's school companion, that those creams had different colored centers and the color of the center determined whether or not the purchaser got one of the larger pieces of candy and the last purchaser got the school companion.

Are you familiar with that type of package?

A. I am with that type.

Q. Do you manufacture such a type of package?

A. We do not.

Q. Has the manufacture and distribution of such a type of package—of such types of packages affected the business of the National Licorice Company?

A. It has so been reported to us by our salesmen from many sections of the country, that it has seriously cut into our sales.

MR. MOHUN: I move to strike out the answer.

THE WITNESS: I will say that it is my opinion that it does.

MR. MOHUN: I move to strike out the rest of the answer. It is pure hearsay and what is not hearsay is opinion.

THE WITNESS: Well, it is impossible to make—to quote figures on something that you have never manufactured yourself or your company has never manufactured and had we started to manufacture it and stopped it, to realize how much you have lost or gained.

MR. MOHUN: I think I will withdraw my objection.

Q. When you say it has affected your business, did you say whether it had increased or decreased your business?

A. It has decreased.

MR. MOHUN: Let the witness be warned in answering a question of that sort and he has just said he could not tell the reasons, that it is fairly to be inferred that it was his opinion or at best a guess.

EXAMINER ALVORD: In answering this question the witness may take into consideration any facts

which he has learned in the usual everyday course of his business without attempting to detail what anybody has stated to him.

THE WITNESS: I can only say that our salesmen have definitely, at various times, reported to us——

MR. MOHUN: I beg your pardon, Mr. Sanford, but you are doing just what Judge Alvord told you not to do.

MR. ROWLAND: I do not think that is so. The witness has just said that the reports came to him in the course of his business; he is not stating what a particular salesman said.

EXAMINER ALVORD: As I said before, he may state any facts which have come to him, regardless of their source, in the usual everyday course of the business, but it is not proper to attempt to state what a salesman or jobber or anybody else has told him. The rest of this is off the record.

(Discussion off the record.)

THE WITNESS: I can only make the statement of what our salesmen have told us and that is where I am dependent for information.

EXAMINER ALVORD: I think the witness may state those things, but not because the salesman has told him, but because he learned it in the everyday course of the business.

MR. MOHUN: Now, Judge, I do not know whether I want this on the record or not. I do not care.

Here they have asked this witness as to whether or not the sale of this certain line of goods has hurt his business. I think he said he does not know——

EXAMINER ALVORD: Just a minute——

THE WITNESS: I said in my opinion it has seriously hurt our business.

EXAMINER ALVORD: Now, then, he can state——

THE WITNESS: I still believe that, that is my opinion.

EXAMINER ALVORD: He can state in connection with that the reasons for that, why he says it has hurt his business.

MR. MOHUN: Pardon me; I think Mr. Sanford had testified that he did not know, that it was his opinion that it had hurt his business, but he could not testify that it has.

By MR. MOHUN:

Q. I think that is a fair statement, is it not?

A. I do not see how I can make any statement, never having manufactured that kind of a package, to know definitely what brought about the decrease, therefore my statement is merely based upon opinion and information that came to me——

MR. MOHUN: Yes, but Judge, you see——

A. (Continued.) —for instance——

MR. MOHUN: There are probably in existence persons who have that information; this witness merely has not it.

MR. ROWLAND: I think as president of this company this witness is in a position to know, and he has a right to state why he states that as an opinion; he has the right to say what that is based on.

MR. MOHUN: He has no right to state his opinion at all.

EXAMINER ALVORD: The witness may answer that question by giving us his reasons for believing

that the sale of the pick and take confectionery has adversely affected his company's sales.

MR. MOHUN: Let me have an exception.

EXAMINER ALVORD: Certainly.

By MR. LANK:

Q. Will you give us your reasons, Mr. Sanford?

A. The salesmen come in from Baltimore, we will say, and I inquire "Why are we losing sales in Baltimore"——

MR. MOHUN: I object to that answer.

THE WITNESS: Shall I go on, Judge?

EXAMINER ALVORD: I am not sure. Just a minute. I think that answer is incompetent in that form. Objection sustained.

Q. Have you, Mr. Sanford, in your—as president of your company, have you noticed a decrease in the sales of your product in various territories?

A. We have at times.

Q. And have you endeavored to ascertain the reason for that loss?

A. We have, naturally.

Q. Did you find out what the reason was?

A. It is the same answer——

Q. No, I think you can answer that question possibly by saying yes or no, can you not, Mr. Sanford?

A. To my satisfaction, yes.

Q. Did you satisfy yourself as to the reason?

A. To my satisfaction; yes.

Q. What were those reasons?

A. One of the reasons is that there are so many pick and takes in the market that straight goods were not selling as well as formerly—regular goods, I meant to say.

Q. Are pick and takes, or the so-called draw packages in competition with your product?

A. Any candy item itself that sells for a penny I consider in competition with our product.

Q. Would you also say that the three-cent candy article or a five-cent candy article was also in competition with your business?

A. All candies are in competition, more or less.

MR. MOHUN: I think that—I hope to have it appear here and I hope to have it also appear that I am plainly objecting to that as Mr. Lank is perfectly aware of the rules in regard to leading questions. He has been cautioned before.

MR. LANK: I think that was almost—I do not think there would be any question about that.

EXAMINER ALVORD: Strike the question and answer out.

Q. You say that you do not manufacture such a package?

A. We do not and never did, to my knowledge.

Q. Have you attempted to meet that competition—no, kill that question.

Why haven't you manufactured such a package, Mr. Sanford?

A. Because we considered it unfair competition.

Q. In what respect and why?

A. We think a concern of our size and standing should not be compelled to adopt that means of merchandising to further sales.

We also look upon the picks and takes as morally bad; they encourage the child to take chances and gamble.

Further than that, it is my understanding that pick and takes are illegal in most States and under city ordinances, local ordinances, that is all.

MR. MOHUN: I move the answer be stricken in its entirety. I cannot see that this witness' opin-

ion with respect to the laws of other States has any bearing in this case and why the motives which actuated him as to whether or not he found that it encouraged a child to gamble has any bearing whatever on the case.

I do not know what he means nor understand what he means by "unfair competition." It is vague and indefinite and the whole answer, in my opinion, should be stricken.

EXAMINER ALVORD: The answer, so far as it relates to the laws of other States or of any State, may be stricken. The reasons given by the witness for the failure of his company to manufacture and put out confections similar to those introduced in evidence by the Commission may stand, subject, of course, to explanation.

By MR. ROWLAND:

Q. What did you mean, Mr. Sanford, when you say that you considered it unfair competition?

A. I consider if it were allowed to go on—if they were allowed to go on with that method of merchandising it would gradually go further and further towards gambling, and we are not in the gambling business as candy licorice manufacturers and we want to keep out of the gambling business.

I believe the method is not a fair business—fair competition, pardon me.

By MR. LANK:

Q. Directing your attention to the quality or the quantity of the candies sold in the so-called draw packages, is there any difference in the value which the ultimate purchaser gets for his penny in the so-called draw packages as compared with the so-called straight goods?

EXAMINER ALVORD: Just a moment before you answer the question. The motion of counsel for

the respondent to strike the answer given by the witness to the former question, in so far as it relates to the answer of the witness that the sale and distribution of the break and take type of confection is unfair competition is granted.

That question is a question which must be determined solely by the Federal Trade Commission upon the facts proven. You may have an exception to that, if you wish, Mr. Lank.

MR. LANK: There is one other question, if your Honor please, that I want to get straightened out now if I can—I will change my mind. I have had my mind changed. There is a question pending before the witness at the present time, I think.

EXAMINER ALVORD: Yes, read the question.

(The question was thereupon repeated by the reporter as above recorded.)

A. It is my opinion that there usually is.

Q. What is that difference?

A. Probably lower quality to make up for the prizes.

MR. MOHUN: I am afraid I shall have to object to that. I do not know what methods he is talking about.

THE WITNESS: I said usually; I am not talking about any specific one.

MR. MOHUN: Well, then, clearly it is objectionable and he states it as an opinion. I am sorry I have to object, but it is necessary.

EXAMINER ALVORD: The objection is overruled for the present until we see what further testimony is brought out.

By MR. LANK:

Q. Have you examined a number of the so-called draw packages, Mr. Sanford?

A. I have examined some of them, yes, at times.

Q. Over a period of how long?

A. I have purchased them outside myself and looked at them and considered them inferior many times. That is still a matter of opinion or chemical analysis. I am not prepared to offer a chemical analysis.

Q. Have you observed a difference in the size of the candy?

A. Yes, I think I have at times.

Q. What was the difference?

A. The draw package, the penny pieces that the child gets for his penny, in the first place, is apt to be a little smaller; that may be the case were the quality the same.

MR. LANK: That is all I have.

By MR. ROWLAND:

Q. Have you ever made an examination of any State statute to see whether or not it is against the law?

MR. MOHUN: I object to that.

EXAMINER ALVORD: Sustained.

Q. You stated that you considered the sale of break and take draw packages as unfair competition——

MR. MOHUN: That testimony has been stricken.

MR. ROWLAND: I have a right to ask the question, Mr. Mohun, I believe I have.

Q. I ask you to give your reasons for considering, so far as that affects your business, unfair for competitors to sell break and take packages.

MR. MOHUN: This testimony of this witness with respect to the use of the break and take packages as constituting unfair competition has been stricken from the record. The effect of that is exactly the same as though the response had not been

made, therefore I think obviously the question is out of order.

EXAMINER ALVORD: Objection sustained.

MR. ROWLAND: I think, Mr. Examiner, that it is entirely competent for this witness to state his opinion.

EXAMINER ALVORD: The Examiner has ruled that it is not, Mr. Rowland, and you can take an exception and go ahead.

MR. ROWLAND: I take an exception to the ruling.

Q. Do you consider that the sale of one of these packages,—of this type of package by a competitor has an adverse effect on your business?

A. I do.

MR. MOHUN: I move the answer be stricken because the witness has already stated it is only a matter of his opinion, he has expressly stated——

EXAMINER ALVORD: The objection is overruled.

MR. ROWLAND: That is all.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. O course you realize, Mr. Sanford, that there are other factors which might adversely affect your income from your straight line of goods, for example, the chain store use of candy, the financial crash which occurred about a year ago and other things of which you probably have more knowledge than I, would have a favorable or unfavorable effect, is that not correct?

A. It is.

Q. Your company, Mr. Sanford, I believe, manufactures licorice only, does it not?

A. Licorice confections and pure licorice, stick licorice, wafers and a line of penny goods.

Q. Licorice penny goods?

A. Yes, sir, one chocolate piece.

Q. Can you tell me, sir, whether there is any concern in the United States which makes licorice and puts it on the market or has put it on the market in break and take form?

A. I do not think so.

Q. So that your penny goods, then, might suffer no competition——

A. Yes, we do, we are in competition with break and take or any penny candy. If a child goes into a store with three cents or one penny to spend and there is licorice or different forms of candy, of course, if they buy the licorice it is our sale, if he takes something else we lose the sale.

Q. Yes, I know, but there are no break and take licorices on the market?

A. Not to my knowledge. There may be some candies that are possibly flavored with licorice made by confectionery houses, I am not sure.

Q. But your information is and your knowledge is that there is not?

A. No.

Q. Of course, as you state, you are in competition with any candy?

A. Yes, that is the way we look at it.

Q. Surely you are not in competition with Huyler or should not be?

A. No, not in connection with pound candies, we are not in competition with pound candies that necessarily cost a dollar or two dollars a pound, but with all penny candies.

Q. But your first statement was correct, you are not in competition with other candies manufactured?

A. No, I did not say that. We are in competition with the dollar or two-dollar a pound candy because

children sell and buy it but our penny sales are sold to children.

Q. Then your other response is not susceptible of accurate proof?

A. No, sir.

Q. You simply fill the market as best you can?

A. No, we consider that our penny items are in competition with other penny items that are sold as candy.

Q. That is what you consider?

A. Yes, sir.

Q. But that is not susceptible of proof from your books or any other method, that is your opinion?

A. We are not jobbers, we don't handle every penny item, we are manufacturers.

MR. MOHUN: That is all.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Sanford, do you sell to chain stores?

A. We do.

Q. Mr. Mohun has asked you if there were other reasons for loss of business and referred to the recent economic crash. Did your testimony cover the period of a number of years and were you considering those things when you testified?

A. My testimony covers a number of years. The chain store,—the items we sell to chain stores are not pennies, they do not retail for a penny, they are bulk goods.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. Just one question, Mr. Sanford, and I think we are through——

A. Yes.

Q. Your company makes a fair return on its investment, does it not?

A. Usually.

Q. What?

A. Usually.

Q. And your profits have been increasing normally?

A. No, sir.

Q. No, sir, did you say?

A. No, sir. The last year's returns were not as good as previous years.

Q. Due primarily to the business depression?

A. I would not say so. I think business depression has helped the sale of penny goods because the children, nowadays instead of having dimes and nickels, only get pennies and they spend their pennies and they buy this licorice or other penny candy goods.

MR. MOHUN: That ends it.

MR. LANK: That is all the testimony we have to offer today, Mr. Examiner.

MR. MOHUN: You are through with Mr. Sanford, are you?

MR. LANK: Yes.

MR. ROWLAND: Well, then, we will excuse him.

(Witness excused.)

MR. ROWLAND: Now, we can adjourn, Judge?

EXAMINER ALVORD: Adjourned to Boston.

MR. ROWLAND: Yes, I think we better adjourn definitely to Boston now.

EXAMINER ALVORD: To the day after tomorrow.

MR. ROWLAND: Yes.

EXAMINER ALVORD: The hearing is hereby adjourned to October 10th, 1930, at Room 331, Young's Hotel Building, Boston, Massachusetts, at 10 A. M.

(Whereupon at 12:10 P. M. an adjournment was taken to October 10th, 1930, 10 A. M., at Young's Hotel Building, Room 331, Boston, Massachusetts.)

Boston, Mass., October 10, 1930.

Met, pursuant to adjournment, at 10 o'clock A. M.

Before: ELIAS C. ALVORD, EXAMINER.

Appearances: MR. LANK and MR. ROWLAND, for the Commission;
MR. MOHUN, for the respondent.

FRANK D. CLOSE, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Close, your full name is Frank D. Close?

A. Right.

Q. Where do you live, Mr. Close?

A. Waban, Massachusetts.

Q. Are you connected with the George Close Company?

A. President and sales manager.

Q. What is their address?

A. 243-249 Broadway, Cambridge.

Q. In what business is the George Close Company, Mr. Close?

A. Wholesale manufacturing of candies, and jobbing of resale merchandise.

Q. For how long have they been in the candy business?

A. Approximately fifty-five or fifty-seven years, something like that.

Q. How long have you been connected with the company?

A. Sixteen years.

Q. Prior to that time had you any connection with the candy industry?

A. Being the son of the founder, I worked there summertime, vacation periods.

Q. What type of candy do you manufacture and distribute, Mr. Close?

A. Chocolate penny goods, wrapped caramels, five-cent bars, bulk chocolates, marshmallows, marshmallow goods, practically everything except pan work and fancy package goods.

Q. Where do you sell your product?

A. Our distribution lies east of the Mississippi and west of the Rockies.

Q. Can you estimate the proportion of your business that is represented by the penny and five-cent goods, Mr. Close?

A. The penny goods we estimate about around 70 per cent. of our business—I withdraw that—around 60 per cent., and around 20 per cent. bar goods, and the rest bulk, that is pail goods.

Q. And your bar goods is your five-cent goods?

A. Five-cent goods. Those figures are approximate.

Q. I show you Commission's Exhibit No. 1, which is marked on the end "Chocolate Penny Men." I will ask you if you are familiar with that type of merchandise, Mr. Close? The testimony with regard to that package is that it contains 120 chocolate-covered creams in the shape of little men, and that some of those creams, I think the testimony was that four of them contained pennies wrapped in waxpaper.

A. Are the pennies supposed to be inside of the goods?

Q. Inside of the goods, yes.

A. And your question is am I familiar with it?

Q. With that type of merchandise.

A. I am familiar with it by hearsay, but not by practice. We don't handle that sort of stuff. We don't make it, and don't handle it. I have seen it before.

Q. I show you Commission's Exhibit No. 4, which is marked on the end, "Big Chief, 1, 2, 3," and ask you if you are familiar with that type of merchandise? The testimony was that it contained sixty bars of chocolate-covered candy.

A. The same answer applies there. I am familiar with it by hearsay and seeing them, having our salesmen report on them, etc., but we don't make them, don't handle them.

Q. Do you come in competition with that type of goods?

A. We don't try to compete with it; that is, we don't try to match it or make it.

Q. I show you Commission's Exhibit No. 8, which the testimony showed contained 200 small, chocolate-covered creams, together with a number of larger pieces of candy, and an additional novelty which is a "School Companion," and ask you if you have come in contact with that type of package?

A. We have come in contact with it, but we have no method of competing with it.

Q. Do you manufacture and distribute packages similar to that?

A. No.

MR. MOHUN: If the Examiner please, I suppose there will be no objection to having it understood that the objection which we made in Baltimore, and was repeated at the hearing in Philadelphia, will be considered as made here to all testimony relating to other than the goods manufactured by the respondent?

EXAMINER ALVORD: The testimony will be so received, and the respondent given an exception to the ruling.

Q. You say you don't manufacture that type of package?

A. No.

Q. Is the sale of your product affected by that type of package?

A. Very much so.

Q. How is it affected?

A. Since the introduction of this type of merchandise into the candy industry the sale of our chocolate penny goods, or of all of our penny goods, particularly chocolate penny goods and five-cent bars, has been cut down greatly. We estimate that 50 per cent. is not too much on penny goods, and 20 per cent. on bars, since the inception of these things. Certain of our customers who have been in the habit of using our line of penny goods, and a few of our bars, on our refusal to make a similar piece, have drifted away from us so that we do not sell them anything now.

Q. You say on your refusal to make a similar piece. Have you had requests to manufacture such packages?

A. Both from salesmen and from customers.

MR. MOHUN: I move that the answer be stricken out, so far as it relates to estimates, unless the witness can give us the facts on which he predicates it.

EXAMINER ALVORD: It is overruled. The facts can be brought out on cross-examination.

Q. If the manufacture of these packages has affected your business as your say, Mr. Close, why haven't you manufactured such a package?

A. We are led to believe that it is against the laws of the State of Massachusetts, and it is certainly against the ethics, as we understand it, in the candy industry. It is absolutely against our own feelings.

Q. Will you elaborate that just a bit, Mr. Close, if possible, explain it a little bit more in detail?

A. I cannot quote the laws of Massachusetts regarding——

MR. MOHUN: That is all objectionable testimony anyhow. That is not the way to prove the laws of Massachusetts.

A. How we feel about it ourselves as men?

Q. Yes.

A. We feel that we should give merchandise of the proper size and quality, with as much for the money as we can. We do not feel that these things here do that, either in quality or in size or in quantity. We feel that it has a very bad effect on the morals of the children, and we have refrained from doing so for those reasons. It would have been to our advantage to adopt some kind of a package like that undoubtedly.

Q. Are you familiar with penny goods generally throughout the industry?

A. I think so.

Q. I will ask you to look at and examine one of those penny chocolate pieces found in Commission's Exhibit No. 8, and compare that with the other candies on the market.

A. Roughly, I should say that was about half the size. In fact, I have seen merchandise of that type that was sold two for a cent instead of a penny.

Q. Can you look at it and form any opinion as to the quality of the candy? Break it, if necessary.

A. (Witness breaks and eats a piece of candy.) I don't know what it is supposed to be, but it does not taste to me like there is any flavor in it at all, and the flavor is supposed to be a very expensive item. If it is supposed to be peppermint, as we have them——

Q. The testimony showed—I think the testimony showed that that was a chocolate covered cream.

A. A vanilla cream?

Q. I think it was a vanilla piece. I won't be positive of that.

A. I wouldn't say that would be up to the standard of the reputable houses as penny goods, even if it were the proper size.

Q. How does that compare in size and quality with your product? I mean your penny creams.

A. I should say it looks about half the size, maybe less than half. I could verify that very easily by having one of our own brought over here, but I did not think to bring one. But we have compared them before, and some of them run half as large, some of them a little more than half, some of them a little less in size and weight. We have not gone to the trouble to have them analyzed to see just what the ingredients are, because we have not been particularly interested in trying to make one or duplicate it, or anything like that.

Q. Is it possible to look at and taste a piece of candy and form a sound opinion as to its value?

A. Only within certain limits, and I would not put myself up as a judge good enough to bring it down to a fine point.

Q. As compared with the purchase of your goods and the purchase of those pieces, Mr. Close, does the child get the same value for his penny, provided he is not one of the winners, as he would in purchasing a piece of your goods?

A. By all means not.

Q. You say that the sale of that type of package, Mr. Close, has affected your business. Do you know whether or not it has affected the business also of your salesmen?

A. Very conclusively we know that.

Q. How has it affected it?

A. Men working on commission brought it to our attention that unless we could make that piece they

would needs get a piece similar to it, or else have us make it for them, in order to pay their expenses and make a living. It is particularly so in the South, and it was so in the State of Ohio to the extent that the salesman did get a number of this type to carry along with ours, when we refused to make one ourselves.

Q. In that particular instance, Mr. Close, after the salesman began to carry it, a package similar to these along with your line, did that affect your business at all?

A. It certainly did.

Q. If you do not understand it, did your business increase or decrease after he carried that package?

A. No; our business has steadily dropped on chocolate covered penny items and five-cent bars. In fact, practically all that this certain salesman, the Ohio man, sells now is caramels and seasonable specialties such as hard candies, on which there does not happen to be many of the draws, as I understand it, these scheme goods.

Q. Have you ever, in employing salesmen, Mr. Close, had them refuse to represent you after they found you did not carry this type of package?

A. I couldn't say absolutely that they refused to represent us on that account. A man did say it was necessary for him to have it, and unless he did have it he would have to look elsewhere. His sales diminished to such an extent that we had to let him go out of self-protection.

MR. MOHUN: I move to strike that out as clearly hearsay.

THE WITNESS: He did not leave us. We let him go.

MR. MOHUN: Objection is made to that question, relating a conversation with some gentleman with whom this gentleman conversed. The Court

has ruled that we have no opportunity to cross-examine this informant.

MR. LANK: I think the next question may take it out of the hearsay status, Mr. Mohun, if the Examiner will reserve his ruling on it until after the next question.

MR. MOHUN: I am obecting to this question.

EXAMINER ALVORD: So far as the answer assumes to state what the witness was told by some other party it may be stricken.

MR. LANK: Your Honor will allow me an exception, please.

Q. The salesman to whom you have reference was employed by you for a period of time, was he, Mr. Close?

A. Our salesmen are employed by the year, and we contract with them—our contract with them is to the effect that we can on a month's notice change by mutual agreement, or let them go by mutual agreement.

Q. Did you have occasion to observe the orders that came in from that salesman?

A. Yes, sir.

Q. Did that salesman leave your employ?

A. Yes, sir.

Q. At whose suggestion?

A. Ours.

Q. What was your reason for making that suggestion?

A. Because his sales did not warrant our keeping him. We were losing ground in that territory.

Q. Do you know why he lost business in that territory?

A. Yes.

Q. Why was it?

A. Because he did not have draws, one reason; and another one, we were not nationally advertising our products. In correspondence the salesman substantiates that.

Q. You referred to your salesmen. Do you have any other method of distributing your product?

A. Other than through——

Q. Traveling salesmen?

A. Occasionally by direct mail.

Q. I think you said that you were in the jobbing and manufacturing business.

A. The jobbing business is local. We do not pretend to make any shipments to cover the territory that I outlined, with re-sale goods. We use our re-sale goods in our local sales room for the convenience of the local wagon men who come in and pick up their needs, both of our goods and re-sale merchandise.

Q. Will you explain what you mean when you say re-sale goods and re-sale merchandise?

A. Re-sale goods are goods we do not manufacture ourselves, such as Hershey bars, Henry Heides goods from New York, Louis Brothers merchandise from Newark, New Jersey, Wrigley gum, Beechnut gum and similar——

Q. What are your methods of selling those products, Mr. Close?

A. We have salesmen on the floor of our sales room, the jobbers come in and our salesmen sell first our own products and whatever re-sale goods we have.

Q. Do you handle a so-called draw package, or pick and take package in that re-sale business?

A. No, sir.

Q. Have you had any requests for it?

A. Numerous.

Q. Has your failure to carry such a package affected your business in that department?

A. Very vitally.

Q. How?

A. By decreasing sales, by some of our strong customers even going so far as not to come in at all now. They can pick our merchandise up, if they need it, at the other distributing houses that do carry a full line of this type of merchandise. We have three of those jobbers that I can call to mind readily that we very rarely see now. One of them told me frankly that he——

MR. MOHUN: I object.

EXAMINER ALVORD: Objection sustained.

Q. In the course of conducting your business do you know why those—I think you called them wagon men; is that correct?

A. Wagon men.

Q. —stopped doing business with you?

A. The reason was they could not pick up this merchandise here, and it was more convenient for them to buy the whole of their merchandise, all of the stuff, at one place, or at as few places as they could.

By MR. ROWLAND:

Q. You have been in the candy business all your business life, haven't you, Mr. Close?

A. Yes, sir.

Q. And made a sort of study of that business?

MR. MOHUN: Please refrain from asking these leading questions. Almost all the questions that come from that side of the table one might expect were in cross-examination. This is your witness. Let him tell the story.

MR. ROWLAND: I think that question is entirely proper. There is nothing leading about asking the gentleman if he has made a study of his business. I don't think there is anything leading about it.

EXAMINER ALVORD: Even if it is, it is practically a preliminary question. Objection overruled.

Q. Have you made a study of the candy business, Mr. Close?

A. Yes, sir.

Q. What effect do you consider that the sale of a package of this type, break and take package, prize packages, has on the candy business as a whole, if any?

A. It has affected our own business very materially. If I understand it, what we hear from outside sources is of no value. Of course, other manufacturers have talked this over with me, and a good many of them have asked us what we were going to do, what steps we were taking to meet it, and this, that and the other. Now, I don't quite know how to answer your question, because I cannot answer it by first-hand knowledge, except what the other people have told me, the effect on their business too.

Q. What I wanted to develop particularly is whether you have any ideas from your own association with the candy business, the fact that you have endeavored to make a study of your business, what your ideas are, if you have any first hand knowledge of it, as to the effect on the general candy business, such as the value of the candy that is sold, or whether this type of package does have any effect on the candy business as a general thing.

A. We believe that it does. We believe that the type of merchandise that is put out in this package is not up to the standard put out by the reputable houses and sold at the same retail price.

Q. You base that belief on examinations you may have made of these goods?

A. Yes.

Q. Take your penny creams. How many do you pack in a box?

A. One hundred and twenty.

Q. And what is that sold to the jobber for?

A. Sixty cents.

Q. The retail price that the jobber sells it for is about what?

A. That is a question that is very mooted. It ranges from sixty-five to seventy-five locally, and in any shipping territories, outside territories, even not very far out, such as Framingham, eighty cents, but in the big centers where competition is rife and there is cash and carries, the price from the jobber to the retailer is ridiculously low.

Q. The price to the ultimate consumer of that box is $1.20?

A. $1.20.

Q. Take your 120-count package of penny pieces, and the 120-count packages of penny pieces that have different colored centers, together with a prize, both of them selling for the same amount. Would it be possible to give the same value in the break and take 120-count package to the ultimate consumer as the value that would be contained in your package, for instance, that has no prize in it?

A. I very much doubt it.

Q. Why not?

A. From the analysis of these break and takes, as I have seen them and looked at them, they never have done it. It must cost them additional to pack an assorted package. I know it does when we pack an assorted package. If we were to pack a row of nougatines and a row of caramels and a row of vanillas the cost would increase. I cannot see why the cost would not increase for packing any assorted package, where it is layered in,

Q. Where there are 120 pieces in a package, for resale at a cent a piece, the price to the jobber is sixty cents in that instance?

A. Yes, sir.

Q. Where there are 180 or 200 pieces would the price be half of that, eighty cents to a dollar, ninety cents to a dollar?

A. We happen to have a 300-count piece of merchandise for certain territory, for our New York territory. Our regular count is 360 for the other territories. For 360 we get sixty cents; for the 300 we get fifty cents. Does that answer your question?

Q. Those are not penny goods?

A. Those are penny goods.

Q. A penny a piece?

A. Three for a cent.

Q. That is what I am getting at.

A. But it is on the basis of a 120 count.

Q. Taking that package of 120 count penny pieces, Mr. Close, as it is sold today for sixty cents to the jobber, if you included with that package sixteen larger pieces of candy, and a last prize, capital prize, as they call it, similar to the one in Commission's Exhibit 8, being a "School Companion," would you be able to sell that package to the jobber at sixty cents?

A. We would not.

Q. You would have to increase the price of it, would you?

A. We certainly would.

Q. Or reduce the size of your penny pieces, or the quality?

A. Or reduce the size of our penny pieces very materially.

Q. Have you ever had any occasion to observe the purchase of any of these penny goods by the children?

A. Not first hand, no.

Q. Does the sale of this type of goods by a jobber have an effect on his straight goods such as yours?

A. Very much.

Q. In what way?

A. If a jobber starts in selling these things he sells a great deal more of these, with a great deal less of the straight goods.

Q. Do you know whether or not the sales resistance is the same as between the two types of goods? In other words, is it easier to sell the break and take than it is to sell the straight?

A. They tell me in some places it is. I have no first-hand knowledge, because I do not go out and sell that type of trade myself, but in talking with those that do sell them, they tell me it is very much easier to sell the break and take. In fact, they are in demand.

Q. The ultimate consumer, as I believe you testified, didn't you, the ultimate consumer does not get the same value for the penny in the break and take as he does in the straight goods?

A. He does not.

Q. Unless he wins a prize, in which case he may get a greater value?

A. Gets much—yes.

Q. Then the distribution of the goods to the ultimate consumer is not the same? That is, in your goods the purchaser gets a penny's worth for a penny, but in the break and take package one may get considerably more than a penny's worth, and another may not get a full penny's worth; is that correct?

A. Exactly.

Q. Are you a member of any candy association?

A. Our firm is a member of the national association, also of the New England Manufacturers' Association.

Q. Have you or has any member of your firm been an officer or a director of either one of those associations?

A. Yes.

Q. Who, and when, please?

A. Our general manager and treasurer has been on the executive committee of the National. I think he finished his term last year. I think he was on for two terms. He has been president also of the New England Association, New England Manufacturers' Association.

Q. As a member of that association, your firm is familiar with the policies of the association, is it not?

A. Yes.

Q. Do you know whether or not either the National Association or the New England Association has ever taken any action with reference to this type of package?

A. I can't say they have taken any—the National has had the matter up repeatedly, but they seem not to be able to reach a satisfactory conclusion, and it has been dropped. The New England Association has had it up, and it has been the consensus of opinion that the thing is not right, and our members should not do it. I say should not do it. Of course, they have got no jurisdiction to say whether they will or not.

Q. What reason does the association give for that?

MR. MOHUN: I object to that. In the first place, all this action of the association is purely irrelevant to the issues presented in this case, and now you are asking the witness what was in the mind of somebody when they came to the conclusion that the members should refrain.

MR. ROWLAND: These are members of the association, and in a position to know the policy.

MR. MOHUN: What is in the minds of the others?

MR. ROWLAND: The policies of the association, so stated.

EXAMINER ALVORD: Objection sustained. I do not see what the policy or action of the association has to do with this matter.

MR. ROWLAND: I think the policy of an association of candy manufacturers, one of their trade practices, is very vital information for the Commission to have, and I think it is entirely competent to show it. If an association has a certain policy or trade practice, and there is no question but that this trade practice is one that has grown up and been increasingly prevalent in the last few years, I think the policy of the association and its attitude on that is entirely competent and very valuable.

EXAMINER ALVORD: Objection sustained.

MR. ROWLAND: I take exception to the ruling.

Q. Mr. Close, have you observed these goods pretty generally in the hands of wagon men and jobbers?

A. Very generally.

Q. From your observation do they carry more of those than they do of the straight goods?

A. No, they do not carry more of these than they do of the straight goods, for the reason that——

MR. MOHUN: I beg your pardon. He has answered that question.

EXAMINER ALVORD: The question has been answered.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Close, your firm, the George Close Company, is prominent in the candy business, and one of the oldest, I imagine, and has been successful, has it not?

A. Yes, sir.

Q. What is your capital now?

A. $175,000.

Q. What did you start with fifty-one years ago—fifty-five years ago?

A. I couldn't tell you; nothing, I think.

Q. Surplus? Have you undivided profits?

A. Yes.

Q. How much, please?

A. Approximately $75,000.

Q. Has the business been uniformly profitable, or have there been years when you were in the red?

A. There have been years when we have been in the red.

Q. Due to depressions like the one that started about a year ago and is still with us?

A. There was a depression in 1913 that I remember very distinctly, at which time we were in the red. In 1915, 1916 and 1917 we got out of that class. From then on until—well, to date, we have kept about above water. Before that time, in 1900, which was before my time, but the records show, they went in the red for a short period of time. Prior to that I don't know.

Q. Of course, Mr. Close, when you refer to being in the red you mean that you are not making money; that it represents a deficit?

A. Yes.

Q. You were losing money; is that correct?

A. That is correct. We do not care to publish those facts.

Q. Yes, they are rather painful. In your direct examination you referred to the fact that you thought it would be impossible for anyone to put out a box of what you call draw pieces of the same standard and quality as the box, for instance, put out by you, with the same number and weight of candies, and to give the same quality, because of the extra cost of special packing or unusual packing.

A. Assorted packing.

Q. Assorted packing—that is what I want—that there would be an additional cost there, so that they could not give the same quality of goods as where there was not——

A. And size.

Q. And size, as where there was not assorted packing. Still you must concede that the manufacturer might take a less profit? It would not wipe out all of his profit, would it, to put it in an assorted package?

A. Under the conditions as they are at present, it would.

Q. What do you know about the cost of putting out a package like Commission's Exhibit No. 8, as compared to another package of straight goods?

A. I don't know anything definitely.

Q. How much does the box of 120 pieces which you sell for 60 cents cost you?

A. Approximately 54, 55, in there. They vary according to what the merchandise is. There is some merchandise that we are putting out which we use as leaders that cost us very close to what we sell them for.

Q. But of course they serve the purpose? You make money on everything you put out?

A. We make money on everything put out.

Q. On the 60-cent box which would cost you 54 cents there is practically a profit of 10 per cent., and the retailer, you testified, sold it at a profit in his hands—or, rather, when it reached the ultimate consumer there was an increase in the selling price from 60 cents to 120 cents; in other words, 100 per cent increase?

A. A spread between our price and the consumer's price?

Q. Yes; that is correct?

A. Yes.

Q. Now, if it transpired and became a fact universally recognized that the sale of these so-called draw

pieces was not contrary to either the law of Massachusetts or any Federal statute, I suppose because of your high sense of ethics you would not sell them then, would you?

A. We would in that case be forced to do it, as we have already talked that situation over.

Q. So you would do it then, wouldn't you, so long as the law permitted it?

A. In all probability we would.

Q. So your solicitude for the child, to prevent or discourage a child from gambling, is not a controlling factor, but rather the legality of the proceeding?

A. It goes to make up a controlling factor.

Q. Yes, but the legality would wipe it out?

A. It would be the competition that would force us to do that.

Q. You testified in regard to that pellet of candy which was before you a few minutes ago, which came from Commission's Exhibit No. 8—you broke one in half and tasted it—that the quality was below that which would be made by—your word—"reputatble house"?

A. Yes, such as—yes.

Q. Are you aware that those candies, that piece of candy you examined from Exhibit 8, was made by R. S. Keppel & Brother, Incorporated?

A. I presume it is. It came out of their box.

Q. Were you led to believe, rather, that it was Keppel's candy when you tasted it and made that remark?

A. Yes.

Q. Do you consider that a disreputable house?

A. No.

Q. What did you mean by saying they were not reputable candy manufacturers? That is what you said.

A. Perhaps the term "reputable" should not be used in that sense. We consider—from our own view-

point we consider the reputable houses those that give a penny's worth for a penny, and if my idea differs from yours it is all right with me, but that is what I considerable a reputable house.

Q. One which does not manufacture draw pieces?

A. Not particularly that, but which gives a dollar's worth for a dollar.

Q. But out of a box here of 100 pieces, or a box of any number of pieces in these exhibits, if a purchaser comes along and buys one at a time, or in one lump, for a dollar, we will say, which would be the cost of acquiring all the pieces, including the so-called prize, are we to understand your testimony as meaning that such a purchaser of Keppel's goods would not get his money's worth?

A. If he bought a dollar's worth of that?

Q. Bought the whole box?

A. That is what the box costs, is it? I don't know. I am asking for information.

Q. Well, we will take a box——

MR. LANK: If I may interpose, it is the 200-piece box which would sell to the ultimate consumer for $2.

MR. MOHUN: Yes. I really don't want that illustration, because it has that "school companion."

Q. But we will take one of the others, one of these bars, for example, Commission's Exhibit No. 4, where the prices are inside. You are familiar with that, are you not?

A. Inside a wrapper?

Q. Yes. If I tell you that the vice-president and treasurer of the Keppel Company stated that the total price of one of his boxes represented not only a fair price for the contents, but that its quality was the same as other candies, straight line candies, and the same

amount of money expended for them would give the same value, are you prepared to testify that is not true?

A. Not without analyzing it myself, no, because knowing the Keppel crowd I should say I would take their word for it. We have had dealings with Keppel and found them always to be upright and very friendly.

Q. Now, you spoke of the candy like that pellet which you saw from Exhibit 8, that it was not worth a cent, in your opinion, and that you knew of candies which were sold larger than that, and, in fact, candies that sold two for a cent.

A. Yes.

Q. Similar to the sample you had before you. You are not speaking of Keppel's candies?

A. No. I am not familiar with Keppel's line, except these particular pieces, because we do not see them up here.

Q. Have you ever caused an analysis to be made of any candies manufactured by Keppel?

A. No.

Q. So these comparisons which you have drawn in respect to other candies, candies of other manufacturers, did not involve Keppel's product at all; is that correct?

A. Ask that again, will you?

Q. You have made certain comparisons and comments between what candies should be and draw pieces manufactured by others, and I ask you if those comparisons involve Keppel's goods at all, of which you say you have never made an analysis or caused an analysis to be made.

A. It is very difficult for me to make a direct answer to that. We have looked at several of these types of merchandise from different manufacturers. So far as we can tell offhand, they are approximately the same size. That is, you take a piece of this type that I broke, of Keppel's make. It is approximately the same

size as a similar piece manufactured by some other firm. Therefore I should say we do not refer particularly to Keppel when we say they do not compare in value with the general line pieces such as made by ourselves. Does that answer the question?

Q. Yes, thank you. That is all.

RE-DIRECT EXAMINATION.

By MR. ROWLAND:

Q. Mr. Mohun asked you, Mr. Close, about the value the ultimate consumer would receive if he bought the whole package similar to Commission's Exhibit No. 4, I believe you used as an example. Is it customary for a child to buy a whole package of these goods?

A. I have never——

MR. MOHUN: Don't answer that question, please. He was asked on direct whether he had ever watched children buy these candies, and he said he had not. I do not see how this gentleman, who is the president of a large company, would be able to respond intelligently to that inquiry as to what children may do down the line. It certainly would not be within his own knowledge.

EXAMINER ALVORD: I think the question is proper in rebuttal to the testimony brought out on cross-examination. Perhaps the question might be framed better.

MR. MOHUN: I do not object to the substance of the question, but I do object to its form. He does not know.

(The reporter read the question as above reported.)

MR. MOHUN: I renew my objection.

EXAMINER ALVORD: Let me ask this witness a question. How are the candies, such as the one

you examined in Commission's Exhibit 8, sold at retail?

MR. MOHUN: I object to that question.

EXAMINER ALVORD: He may answer if he knows.

THE WITNESS: Sold as penny goods, a penny apiece, put in a case and sold at a penny apiece.

EXAMINER ALVORD: That is all.

Q. Would you answer the question I asked, if you can, Mr. Close?

A. I never heard of anybody, any consumer, buying a full box.

Q. Then your answer, based on the value received by a consumer buying a complete package—would your answer be the same, considering the way the goods are ordinarily sold, by children coming in and spending one, three, five, ten cents—would one of those children buying one of those pieces for one cent, three cents or five cents, whatever it happened to be, receive the same value, exclusive of the prizes they might receive, as they would if they bought that same number of pieces of your goods?

A. In my opinion they would not.

MR. MOHUN: I object to both the question and answer. It is not within the knowledge of this witness.

MR. ROWLAND: In view of the question counsel asked on cross-examination and the inference that might be drawn from it, it is entirely proper to develop it further as I have done.

MR. MOHUN: You see, Mr. Trial Examiner, I was not concerned with what—the question was not concerned with what children do or refrain from doing in the matter of purchase. It was purely a

supposititious case and was concerned entirely with value, what they would get.

MR. ROWLAND: And was limited to the value that a person would get if they bought the whole package?

EXAMINER ALVORD: Yes.

MR. ROWLAND: I am bringing out what happens when they buy as individuals.

EXAMINER ALVORD: I want to say this, that in the present state of the testimony it is self-evident that the ultimate purchaser who buys these penny goods one at a time, or five at a time, if he fails to get a prize, does not get the same value that he receives when he buys straight penny goods. That is self-evident, and requires no testimony.

MR. MOHUN: It has been abundantly shown. He parts with his penny, and he gets a chance of getting something, though, which has a value.

Q. Mr. Close, some question arose during both the direct and cross-examination about the word "reputable." Assuming that the sale of a package of this type, a break and take package, was against the laws of practically all of the States, and perhaps many of the municipalities, would you consider that a manufacturer selling that type of package, with knowledge of that fact, would be a reputable manufacturer?

A. I would not consider him so.

MR. ROWLAND: That is all.

MR. LANK: I have got just one question. Mr. Mohun, Exhibit No. 8 has suffered considerably in transferring it around from place to place. I have here a duplicate of that exhibit which has not, I think you will agree with me, been apparently disturbed.

MR. MOHUN: If you say nothing has been disturbed, that is good enough for me.

MR. LANK: We cut the strings a few minutes ago. I do not want to substitute it, but I want to base a question on that exhibit, because the present Exhibit 8 does not quite show the picture.

MR. MOHUN: That is quite all right.

By MR. LANK:

Q. Mr. Close, I think you testified that you have been in the candy business for quite some years?

A. Yes.

Q. You are familiar with the cost of packing different packages of candy, are you not?

A. Those which we make I am thoroughly familiar with.

Q. And you do make a number of various packages, do you not?

A. Yes.

Q. Looking at the package I now hand you, which is in my honest belief a duplicate of Commission's Exhibit No. 8—and examine it, if you care to—would the cost to the manufacturer of packing that package be more or less, or could you compare it with the packing of a straight package of candy where all the pieces are the same in size, shape and manufacture?

A. If we were to do that in our plant it would cost us considerably more. This package here would compare with a straight—this one here, I don't know how many pieces are in that particular package.

MR. LANK: May the record show that the witness is referring to the package within the package which contains the 200 penny pieces.

THE WITNESS: It contains 200?

Q. Yes.

A. It would cost us more to pack that 200 count than it would to pack 200 of our own goods, for the

reason that they are smaller, but relatively, if we were to pack the same size piece as that, 200 count straight, without reference to any funny centers, if they were all the same, we could pack them for the same cost as anybody else presumably, but it is over my head how they can pack a certain number of different colored centers without raising their cost price for packing.

May I elaborate that a little bit more?

Q. Yes.

A. We have a package that is not penny goods; it is five-pound goods, in which we put a certain number of foil-wrapped pieces, a certain number of caramels, a certain number of nougatines, and like of that. We have got our cost figures for packing that certain number. We found that we could actually save money if we disregarded the definite number of pieces of each of those varieties and took them as they came. Do I make myself clear?

Q. Not quite.

MR. MOHUN: No, nor is it relevant, as I see it.

THE WITNESS: Maybe it is not relevant.

MR. LANK: I think it will be relevant.

THE WITNESS: It is up to you gentlemen to stop me if it is not relevant.

MR. MOHUN: Try and stop you.

MR. LANK: I don't know whether any objection is before the Examiner at the time.

MR. MOHUN: Yes.

MR. LANK: My object in this was in response to Mr. Mohun's cross-examination, that he did not know what it would cost to pack an assorted box.

MR. MOHUN: Who is he?

MR. LANK: That the witness would not know what it would cost to pack an assorted box. He

attempted to infer that—at least that was the impression that I got from his questions—and I wanted to answer that.

MR. MOHUN: It looks like you are endeavoring to make your witness contradict himself.

EXAMINER ALVORD: Objection overruled.

Q. You may proceed with your explanation of what you meant by it.

A. Well, in this five-pound box of assorted chocolates we laid out a definite number of pieces of each kind to put into the box and got a cost on it. Then we got a cost on putting the whole—packing the whole assortment as it came through the machine. In other words, when we took a definite number of pieces of each kind we had to dip each kind, that is run each kind of goods through the enrober and case-pack it, and then assort it from the cases into the boxes. We found it was cheaper to assort the goods before they were dipped, that is a certain number of trays of this kind, and a certain number of trays of that kind, all poured into the same hopper and let go through the dipping machine, and packed as they came out on the plaques into the box.

MR. MOHUN: I am sorry, but I shall have to move to strike that out. In the first place, of course, he is talking about his own candies, and he does not know what it would cost Keppel Brothers, Incorporated, to put up that box. He does not know anything about how we handle costs. We might make circles around you, or it might be the reverse.

THE WITNESS: I think, if I may be excused just a second, I said that in my opinion it was over my head how anybody could pack an assorted package at the same price that they could a straight run.

EXAMINER ALVORD: I think with that explanation I will let it stand. It is more or less irrelevant.

Q. From your knowledge of the candy manufacturing business, Mr. Close, if it is necessary to distribute sixteen pink centers into a package of 200 count, the remainder being white centers, would it cost more to so assemble a package than it would if they were all white centers?

A. It would cost us more.

Q. From your knowledge of the candy business do you deem it possible to pack a box with sixteen pink centers and 184, to be exact, white centers than it does to pack 200 white centers?

MR. MOHUN: That package is objectionable.

Q. From your knowledge of the candy business would it be possible to pack them that way?

A. It would be possible, yes.

Q. I don't know whether I got the answer correct or not. If I did, all right. I understand your answer to be that it is possible to pack sixteen pink centers in a package of 200?

A. Yes.

Q. The remainder being white, at the same cost of packing?

A. No, not at the same cost. I understood you to say is it possible to pack them. Not at the same cost. It would cost us more to pack them. Somebody else might be able to do it, as the attorney said.

Q. I am directing your attention to the candy industry. Do you know whether or not a manufacturer could pack 200 white centers at the same cost that he could pack 186 white centers and sixteen pink centers?

MR. MOHUN: I object. He is not qualified to express an opinion on that. The witness has very properly confined his responses to his cost. It is a broad thing to say it isn't possible to do anything that is mechanical.

MR. LANK: I am asking him if he can say. I am not asking him to go beyond what he knows and can say.

A. I cannot say that I know what somebody else could do in that case. We could not do it.

Q. In addition to the pink centers in the package of penny pieces, there are also other assortments in the same package; that is, there appears to be ten of one size chocolate novelties, you might call them, and four of a different size and type of chocolate novelty. From your knowledge of the candy industry, is that an added item of cost in packing?

A. No.

Q. To arrange them that way?

A. No; we could pack that all right without extra cost.

RE-CROSS-EXAMINATION.

By MR. MOHUN:

Q. In your direct testimony you spoke of having made a study of the candy industry. What did you mean by a study?

A. Well, I have looked into the laws pertaining to the candy industry, the specifications you must have, from the Bureau of Weights and Measures, and from the different authorities in Washington, as regards ingredients and the different styles of packing and packaging, and the different methods of handling, the different machines that are on the market for the making of different types of goods. Does that answer your question?

Q. Yes, sir.

A. I cannot say I have studied it out of a book, like you if you went to college, book knowledge, something like that.

Q. No, but as I take it, Mr. Close, your response to my previous question was a definition of what you meant by a study of the industry? I did not know.

A. I was just trying to——

Q. That was a completed answer, your answer, of what you mean by a study, was complete, I assume?

A. All right, sir.

MR. MOHUN: Thank you.

MR. LANK: No further questions.

ALTON L. MILLER, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Miller, your full name is what?

A. Alton L. Miller.

Q. With what company are you connected, Mr. Miller?

A. Charles N. Miller Company.

Q. What is the address?

A. 16 Medford Street, Boston.

Q. In what business are they engaged?

A. Manufacture and wholesale of candies.

Q. What is your position with the company?

A. Treasurer and general manager.

Q. How long have you been so connected?

A. Thirteen years. I have always been connected with the business. I have been devoting my full time for the last thirteen years.

Q. What type of candy do they manufacture, Mr. Miller?

A. Penny candy very largely.

Q. And the question I want to be framed the same way. What I am directing your attention to, there are a number of different kinds of penny candies, caramels and chocolate-covered candies, and numerous candies.

A. We manufacture chewing candies almost exclusively, penny chewing candies. Our particular brand is the "Mary Jane" candies. It is known by that. "Mary Jane" is molasses chewing candy filled with peanut butter, also put up in a five-cent bar.

Q. Over what territory do you sell your candies?

A. The United States.

Q. I direct your attention to Commission's Exhibit No. 4, which has on the end of it a label, "1, 2, 3, Big Chief, 60's," and I will ask you if you are familiar with that type of package.

A. Yes.

Q. The label explains what the contents of it would be?

A. There would be no question at all.

Q. I also direct your attention to "School Days, 200's," which is Commission's Exhibit No. 8, and ask if you are familiar with that type of package.

A. Yes.

Q. Do you manufacture such a type of package?

A. No.

Q. Is your product in competention with such candy?

A. Constantly, yes.

Q. Those packages, Mr. Miller, the testimony shows, were manufactured by R. F. Keppel Company. Have you ever seen any of Keppel's packages in Boston?

A. Yes.

Q. What effect, if any, has the competition of those packages on your business?

MR. MOHUN: I object. In the first place, this gentleman is treasurer of the company. It has not been shown——

MR. LANK: Just a minute. He is treasurer and general manager. Just get your mind at ease on that.

MR. MOHUN: I don't know what experience he has had with sales, I am sure. He has not shown he has any. He may be intimately connected with it.

EXAMINER ALVORD: The objection is sustained at the present time.

MR. LANK: I will qualify the witness, and then renew the question.

Q. You stated you were treasurer of the company, Mr. Miller?

A. Yes.

Q. You are familiar——

MR. MOHUN: Don't ask leading questions all the time.

Q. Are you or are you not familiar with the income of the company?

A. The company is completely managed by myself. It is almost a one-man company. I am familiar with all the details of every department of manufacture and sales.

MR. LANK: I now submit the question that was objected to as proper.

MR. MOHUN: Let us hear the question, please.

EXAMINER ALVORD: You better repeat your question.

Q. What effect has the competition of these packages on your business, if any, Mr. Miller?

A. The effect has been a very serious one from the time that this type of package first came on the market. In the first place, we are doing a double business. We wholesale candy made by other manufacturers as well as manufacture our own and distribute that. When this type of package first came on the market we were doing a very large resale business in

Boston. I discovered one day some of these packages on our shelves, having been purchased by another man, and immediately insisted that all of them be removed, and that we discontinue at once offering them for sale. From that time on we made no purchases of that type of product from any concern, but we very soon discovered that the demand in the usual trade channels was for that type of package, and not for the type of packages we were offering. The result was that the sale of our resale goods was tremendously cut down. At the present time for that reason partially, not altogether, but certainly partially for that reason, our resale business has dwindled to almost nothing. We are doing about 15 per cent. of the business that we were doing six or seven years ago.

Our difficulty did not stop with the resale business. We found that as our salesmen attempted to sell our own penny manufactures they were constantly being crowded for this type of package which we refused to make. The result was that our sales were lowered in favor of the manufacturer who was putting out this type of package.

Q. Notwithstanding that effect on your business, Mr. Miller, do you now manufacture or distribute such a package?

A. No, we do not.

Q. Why not?

A. Probably for two reasons. In the first place, we have an old New England conscience that forbids our manufacturing such a product; and in the second place, because we believe that in the long run it is not good for the candy industry to undertake the merchandising of a chance rather than the merchandising of candy, and of course that is what this means. The selling of that product does not represent the merchandising of candy. We believe that in the long run the child is going to eventually insist on getting his

money's worth. He does not get his money's worth in candy when he buys the average penny's worth of this type of product.

Q. You say that this type of package is not the merchandising of candy. Will you explain that just a bit, if you have any explanation?

A. In selling that package you are merchandising a chance, you are selling a chance of getting something. The product that you offer for a cent is not a cent's worth of candy; it is a portion of candy, plus a portion of a chance, and your cent's worth includes your chance as well as the candy.

Q. You said, Mr. Miller, that your conscience would not permit you—I do not intend to misquote you, and if I do, correct me—your conscience would not permit you to manufacture such a type of package. Will you explain that answer, if you please?

A. For two reasons: In the first place, I do not believe it is wise to cultivate the gambling instinct in the younger children. It is there. Our sales are made almost entirely to the children, and I do not think it a good plan to cultivate that instinct with the children. In the second place, I have considered that it was not according to the laws of most of our states.

MR. MOHUN: The usual objection on the law proposition.

MR. LANK: I think if he considers it a violation of law, and therefore refrains, he has a right to——

MR. MOHUN: I withdraw the objection.

MR. LANK: He states that is his reason for refraining from it.

Q. Had you finished your answer?

EXAMINER ALVORD: The objection is withdrawn.

(The reporter read the last answer as above reported.)

A. (Continuing): And therefore I refrain from indulging in that practice.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Miller, I wish you would be good enough to explain what you meant by the resale portion of your business? I did not understand that.

A. We do two kinds of business, that is a jobbing business in which we resell the products of other manufacturers. In addition to that, we manufacture our own goods and sell them through the usual channels.

Q. Do you know that the method of disposing of candies through lot or chance, as you may call it, for example through the use of the punchboard, was begun in this country as far back as 1907?

A. I don't know the facts in the matter.

Q. Your testimony on direct showed that when this type came on the market you noticed an appreciable loss in your penny business. When did it come on the market?

A. This particular type of penny candy came to my attention, I will guess at five or six years ago. That is just a guess. I don't know.

Q. But that is when you noticed the loss or the falling off of your sales of penny candies, five or six years ago?

A. I don't remember the dates. I haven't any means of knowing. That proposition is entirely apart from the matter of selling packages by punchboards.

Q. I know it is apart, but I asked you if you ever heard of it being done that way. Are you aware of the fact that candy is being sold by punchboards?

A. In some places, certainly.

Q. You stated that in your opinion the sale of the pick and take or draw candies was not good for the industry?

A. Yes.

Q. Did you not?

A. Yes.

Q. Why? On moral grounds, or on economic grounds?

A. On economic grounds, because the sale does not deliver to the child a full value of the merchandise for the penny spent.

Q. If the child buys an entire box he gets full value, does he not?

A. The child cannot buy a full box ordinarily. He has merely a penny or a few pennies to spend.

Q. Suppose, Mr. Miller, it was finally decided and universally accepted that this method of draw candies was not violative of either the state laws or of any Federal statute. I suppose you would still refrain from manufacturing draw pieces on account of your moral view, your New England conscience?

A. It is very difficult to say today what a man would do under unknown circumstances.

Q. Those are very definite and well-known circumstances I have mentioned, namely, that it was not violative of law. Would you feel then justified in going into the business of making and manufacturing draw pieces?

A. I don't think so. I think I would still feel that were sufficient moral grounds for not doing so, and also I would still feel that it would not be good for the candy business, the penny candy business.

Q. Are you through?

A. Yes; entirely apart from the legal side of the question.

Q. If I construe your answer correctly, it means that you would not go into the manufacture of draw

pieces, although there was no state or Federal law to prohibit it?

A. That is my opinion at the present time, yes.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. In that connection I have got one question. We are trying to follow out Mr. Mohun's assumption. Assuming that it was not illegal to manufacture such a type of package, Mr. Miller, but assume also that it was contrary to the laws of practically every state of the Union for a package to be distributed to the ultimate consumer in that manner and method. Would that in any way affect your feelings in the matter?

A. Under those circumstances I most certainly would not be interested in manufacturing or selling such a product.

Q. You also stated, in answer to Mr. Mohun's question, that your moral view might influence you because you did not think it was good for the industry. Do you consider that what might be good for the industry is a moral question?

A. No, not at all. I place the two entirely separate, as a moral question and an economic question, as well as a legal question.

By MR. ROWLAND:

Q. Mr. Miller, assuming that the distribution, manufacture and distribution of this type of package is illegal under the laws of most of the states and municipalities, do you think that your company has an equal opportunity when you do not manufacture such a package and distribute it, with a company that, knowing these facts, does distribute it?

A. No, we do not have an equal opportunity, because it is inborn in the child, the desire to gamble. The child is undoubtedly going to play at this game if the opportunity is offered. We are competing with

other manufacturers for that child's penny that he has to spend. There is an element in this that we refuse to put into our package which is attractive to the child, and therefore we are at a distinct disadvantage.

(Witness excused.)

(Whereupon, at 12:15 P. M., a recess was taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

The hearing was resumed at 1:30 o'clock P. M., pursuant to the taking of recess.

HARRY RUSSELL CHAPMAN, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. What is your full name, please, Mr. Chapman?

A. Harry Russell Chapman.

Q. Where do you live, Mr. Chapman?

A. You mean my residence address?

Q. Yes, please.

A. Wellesley Hills, Massachusetts.

Q. With what company are you connected?

A. The New England Confectionery Company.

Q. What is the address of that company?

A. 254 Massachusetts Avenue, Cambridge, Massachusetts.

Q. What is your position with the company?

A. General sales manager.

Q. In what business are they engaged?

A. Manufacturing confectioners.

Q. What type of candies?

A. Manufacture a full line of all classes of make.

Q. And that full line includes penny goods?

A. Yes, sir.

Q. About what proportion of your business, if you can estimate it, is the penny and five-cent goods?

A. You mean combined?

Q. Yes, or separately, if you can give it that way.

A. The penny goods is about 30 per cent., and the five-cent bar goods is about 40 per cent.

Q. About 70 per cent. of your business is the two types?

A. Penny and five-cent, yes.

Q. Over what territory do you distribute your product?

A. The entire United States.

Q. By what method?

A. By local freight shipments, and by pool car shipments sold to jobbers.

Q. How long have you been connected with that company?

A. Four years and three months.

Q. Prior to that were you in the candy business at all?

A. No, sir.

Q. I call your attention to Commission's Exhibit No. 8, which has on the front of it, "School Days 200's." The testimony showed that package contained 200 small chocolate-coated creams and a number of larger pieces of candy, together with a child's "School Companion," and I will ask you if you are familiar with that type of merchandise.

A. Yes, sir.

Q. I also call your attention to Commission's Exhibit No. 4, which has a label on the front of it, "1, 2, 3, Big Chief 60's," and ask you if you are familiar with that type of package?

A. Yes, sir.

Q. And the label will indicate the contents sufficiently, with that description. I might say for your information that the testimony was that the contents of that package were a number of chocolate-coated bars contained within a wrapper, and also within that wrapper were what might be termed price tickets; that on a number of them was "one cent," on a number of them "two cents," and on a number of them "three cents," the ultimate consumer paying whatever was shown on that ticket.

A. Yes, sir.

Q. Do you manufacture or distribute such a package as either of those?

A. No, sir; we do not.

Q. Are you in competition with that type of package in marketing your product?

A. Yes, sir.

Q. Has the manufacture and distribution of that type of package affected your business?

A. Yes, sir.

Q. How?

A. Well, in the case of the penny goods it has diverted business from the so-called regular type pack of penny goods to the draw package type.

Q. You may go ahead with your answer.

A. I answered that the draw package type of merchandising has diverted business from the so-called legitimate type of penny goods to the draw package. In other words, the legitimately packed penny goods, with no draw pieces or no lottery features, have given ground to the lottery package.

Q. Notwithstanding that competition, you say you do not now manufacture such a package?

A. No, sir.

Q. Why not?

A. Because in the majority of States we define such a package as being illegal.

Q. In what respect, in your opinion?

A. In that it constitutes a lottery, where the sale of the contents is dependent upon the element of chance.

Q. Is that your only reason for not manufacturing such a package?

A. No; that is the technical reason.

Q. What are your other reasons?

A. The other reason is that in order to produce such a package at a profit you have got to take something out of the quality of the goods, which our policy would not permit us to do, in offering the consumer adequate value. I might qualify that still further in this way, that in the majority of these packages, in fact the 200 count, there are 20 winners and 180 losers, and the 20 winners must take their excess of value out of the value received by the 180 losers.

MR. LANK: I am going to take it for granted that we have covered that field enough so that we do not have to explain that answer in more detail.

EXAMINER ALVORD: I think you have.

Q. I don't know whether you said so or not, and if I do not state it correctly you correct me. Did you say you sell your product through traveling salesmen?

A. Yes, sir.

Q. To jobbers?

A. Yes, sir.

Q. Have you had any requests from those traveling salesmen or their jobbers regarding the manufacture or distribution of such a package?

A. Yes, sir.

Q. And what did those requests deal with?

MR. MOHUN: I don't know what "deal with" means.

MR. LANK: I will withdraw the question.

MR. MOHUN: I object to his bringing in information of what somebody else said.

MR. LANK: I withdraw the question.

Q. I don't know whether it is clear on the record. By that do you mean that you have had requests for it, or have you not had requests for it?

A. We have had requests for it, and we have had reports from our men that the draw packages were interfering with the sale of our regular penny goods.

Q. Those reports come to you in the regular course of business?

A. Yes, sir. I have made extracts from those letters.

MR. MOHUN: Please do not read them until an objection is heard.

Q. In territories where you have had requests have you noticed any effect on your business by your failure to manufacture such a package?

A. Yes, sir; we have given ground in the sales of regular penny goods in most territories because of this draw package competition.

Q. And you said that it is your opinion that they are in violation of the law in the distribution of such packages?

A. Yes, sir.

Q. Assuming, Mr. Chapman, that the laws of the various States, of practically all the States of the Union, prohibit the sale of this type of package, and your refusal to manufacture such a package by reason of such laws, do you think you are then selling on equal terms with a man who does not object to putting out such a package?

A. Certainly not. When some manufacturers observe the law, and others do not, competition becomes unfair.

MR. MOHUN: I move to strike out. That is a legal question.

EXAMINER ALVORD: Motion sustained.

MR. LANK: May the motion be limited to the last clause of the witness' answer, which deals with his conclusion or definition of unfair competition?

EXAMINER ALVORD: The part of the answer beginning with the clause, "When some manufacturers observe the law," from there on it may be stricken.

Q. Why do you consider that you are not able to meet the competition properly?

A. Well, there is a certain sales pull to a package that presents the element of chance. That seems to be something that is inherent in everybody, to be attracted by that form of merchandise, and there is only so much business to be obtained, and when the money is spent in that direction it is diverted from the other direction.

Q. Mr. Chapman, directing your attention to Commission's Exhibit No. 4, which is what we term the "1, 2, 3 bars," and calling your attention to the fact that that bar is wrapped in paper, and within that paper is a ticket stating the price which the child pays for it, and the label on the front of the box is marked, "1, 2, 3 Big Chief"; and also calling your attention to Commission's Exhibit No. 5, which has a card that is also contained in the box when it is packed for shipment, and assuming that that package comes intact in that condition to the retail merchant, is it practicable for the merchant to sell that package in any other manner than as a so-called draw package?

MR. MOHUN: I object to the question. The witness is not a retailer. Anything he would say in respect to how retailers handle this candy, or, as you seek to show by this witness, that it would be impossible for a retailer to handle the candy in any other way, is surely beyond his knowledge and would be nothing but speculation.

MR. LANK: I won't insist on the question, in view of your objection, Mr. Mohun.

Q. In the course of business, Mr. Chapman, do you see the orders that come in from your traveling salesmen?

A. Yes, sir.

Q. In territories where they have requested the distribution—that you manufacture such a package for distribution, have you been able to observe any effect to their business as traveling salesmen?

A. Yes, sir.

Q. Do those salesmen work on a salary or on a commission?

A. They work on a salary, a bonus, and a profit-sharing plan.

Q. Has the effect that you have noticed been an increase or a decrease in their business?

A. A decrease on penny goods.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Mr. Chapman, your experience in the candy business covers a period of four years and three months, I believe?

A. Yes, sir.

Q. You were never in the candy business before?

A. No, sir.

Q. At the time you came into the candy business the so-called draw pieces were on the market; isn't that true?

A. Yes, sir.

Q. And they have been continuously on the market ever since?

A. Yes, sir.

Q. I suppose in your position as general sales manager you have reports from your salesmen and others

in regard to various competitive conditions existing in the field?

A. Yes, sir.

Q. Other than this?

A. Yes, sir.

Q. Including this, but also?

A. Yes, sir.

Q. You try to meet those conditions as best you can—this is purely speculative on my part—for example, putting goods in more attractive containers, or other methods which more readily suggest themselves to you than to me; isn't that true?

A. Yes, sir.

Q. Now, one of the competitive conditions you have to meet are draw pieces?

A. Yes, sir.

Q. Why do you say diverted by the draw pieces? That is your word. There is the field, there is the trade. Now, we will say that a certain number of hundreds of thousands of dollars go to draw pieces, the manufacturers of draw pieces, another large sum of money goes to the manufacturers of straight-goods, as you call them, different from yours, perhaps better than yours. So far as the situation stands now, that is a legitimate field, so why do you say diverted?

A. We do not consider the draw packages offer legitimate competition to the regularly packed penny goods. It is true that all candy is in competition with all other types of candy, and there is only so much money being spent by the public every year, and the question of where that money will be spent is determined largely by the various competitive offerings. Now, we consider this draw package an illegal package, and the ethics of our business would prohibit us from putting it out as such. Our analyses of these draw packages generally in the trade, and of this one specifically under discussion today——

Q. Whose is that?

A. Keppel's—show that it is not good value for the consumer.

Q. What kind of an analysis?

A. An analysis by value, including quality and weight.

Q. Chemical analysis?

A. Well, not necessarily a detailed breaking down of the piece, but a physical analysis, if you want to put it that way.

Q. What does that mean?

A. A physical analysis means a comparison of the quality in the chocolate coating, in the cream center and in the flavor.

Q. That does not inform this Commission what is meant by physical analysis. Do you inspect the filling, taste it?

A. Yes, sir.

Q. That sort of thing?

A. Yes, sir. I use the word physical as distinct from a chemical analysis. If you physically taste a piece of goods you give it a physical examination.

Q. But you don't know the percentage of pure sugar, the percentage of chocolate, the relative weights of the filling as compared with the coating? You have not done that? You have just tasted it and examined it and come to the conclusion that the goods put out by this respondent—now, listen to me, because this is important.

A. Yes, sir.

Q. The goods put out by this respondent, taking a whole box, and the money which they get for it, and which the retailer gets for it—in other words, that the entire contents of the box are not worth what the manufacturer gets for them, or what the retailer gets for them?

A. By comparison——

Q. By comparison with a straight line of goods?

A. Yes, sir.

Q. You say that is not true, that they are not worth the money?

A. No, sir.

Q. And the only analysis—you used that rather highbrow word—which you have made consists of breaking it apart and tasting it? You have not testified that you weighed anything. Did you weigh them?

A. Yes, sir.

Q. The filling, as compared with the coating?

A. No, sir.

Q. Why did you do it? What were you doing, analyzing, as you call it, Keppel's candy? At whose instance?

A. We always try to keep posted on what competition we are up against, and we have made many analyses of these packages in an effort to determine whether or not the consumer was getting value, and whether or not this was a legitimate field of competition.

Q. I don't know what you mean by the word "legitimate."

MR. MOHUN: I withdraw the side remark made in that question, that I did not know the meaning of the word "legitimate."

Q. How did you happen to make an examination—my question was very definite—of these respondents' candies—an analysis as you characterized it? What was the occasion, and when was it done?

A. It was done this week.

Q. At whose suggestion?

A. Mine.

Q. After you were subpœnaed to be a witness in this case?

A. Yes, sir.

Q. Keppel & Company competitors of yours?

A. Yes, sir, in that they are manufacturers.

Q. Well, they are in the market the same as you are?

A. Yes.

Q. I don't know what their territory is, but you said you sold all over the United States; isn't that correct?

A. Yes, sir.

Q. Now, if you were told, or if it transpired and was universally recognized that the sale of goods manufactured—the sale of draw piece goods was not violative of any law, State or Federal, would you manufacture them?

A. No, sir.

Q. That is because of your feeling of ethics?

A. Yes, sir; we do not think it is a good method of merchandising candy, because it involves winners and losers in the same package. All buyers out of that package do not get equal value.

Q. Everybody knows that. That is admitted. If I show you this, which is true, that the vice-president and general manager of this respondent has testified in this case that the quality of his goods in the draw pieces, and the total value in candy represented in a box of draw pieces is the same as in the box of his regular line, would you say he was right, or you were right?

A. Maybe he is right, but I am comparing this draw package with a box of the regular line. I don't know anything about how it compares with his regular line. I did not mean that at all.

Q. You testified, in effect, that the goods were inferior, and had to be, in order for him to sell them at that price. I don't know what you meant by inferior, I am sure. Perhaps you do. What did you mean?

A. I meant they were inferior to the general run of regularly packed penny goods that are in competi-

tion with these draw packages, including our line. I had specific reference to our line.

Q. Did you mean they were inferior to his general line in quality?

A. No.

Q. I mean to the respondents' general line?

A. No, I was not talking about his general line. I was talking about his draw package in comparison with our general line of similar candy sold in the regular, legitimate way, without any chance features.

Q. I understand. And at the same time you made no analysis in the proper sense of the word, of his candy as compared with yours?

A. In the candy business we get to a point where we can very quickly judge comparative qualities without a chemical analysis. That is something which comes with experience in examining comparative values. I did make a comparison of his weights on this package, and the total weight of the 200 pieces of his one-cent creams is two pounds and ten ounces.

Q. You mean including the prize pieces, so-called?

A. No; that is just the one-cent pieces. Now, the total weight of the same quantity of our regular one-cent pieces is seven pounds and one and a third ounces.

Q. We understand that.

A. That is pretty good evidence of the lack of value to the consumer in this other package.

Q. I think we all know what that means, and know what you mean. The question was whether you knew, or were willing to testify whether there was any disparity as to quality or quantity in Keppel's straight line, in a certain number of pieces and a certain weight, as compared with the same—in the draw box——

A. I haven't made that examination personally, but it stands to reason there could not be, if he is giving away an extra something in his draw package, unless he is doing it at no profit.

Q. Yes, but you have in your mind, Mr. Chapman, something different from what I have in mine, which I am trying to express. I am taking the total weight of the candy and quality of candy that goes out in his straight line, as compared with his draw pieces. I am sorry I did not make that clear.

A. That may be very true.

Q. You were thinking of the individual purchaser?

A. Yes, sir.

Q. Who might draw a white filling?

A. Yes, sir.

Q. And ignoring the person who might draw a pink filling?

A. Yes.

Q. You spoke of losing ground, I mean in sales. When did that commence, and with what were you comparing? Losing ground as compared with what other period?

A. I mean a certain trade that we have enjoyed on penny goods which had fallen off because of the introduction of these draw packages. There have been more of them around on the market this last year than ever before, and at the national convention in Chicago we had a meeting out there of penny goods manufacturers, and there were forty-five men present, and forty of them got up and testified they were making these draw packages in self-defense.

MR. MOHUN: I object to the answer. You said they said they had to make it in self-defense. Let it stay, if you want it. I think that is all, Mr. Chapman.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Chapman, have you made somewhat of a study of the industry as regards this type of package?

A. Yes, sir.

Q. Can you tell us approximately how many manufacturers are making this type of package?

A. I can tell you how many members of the National Confectioners Association are making it.

MR. MOHUN: I object to that. There is no significance to that.

Q. How many members of the association are there, do you know?

A. There are 450 active members, and 150 inactive. The 450 are bona fide candy manufacturers.

Q. How many of them are making this type of package?

A. Three hundred and eighty.

Q. Mr. Chapman, have you seen the packages manufactured by Keppel in Boston?

A. Yes, sir. That is, I have seen them on sale in Boston. They are not manufactured here.

Q. I was thinking that question was framed wrong. Mr. Mohun directed your attention to the competition in the industry. Assuming for the moment for the purpose of this question that it is contrary to the laws of practically all the States for such packages as we have in this case to be distributed and sold in the various States of the United States, and the competition that Mr. Mohun directed your attention to, of pretty boxes and such methods, do you consider that there is any difference in meeting competition where the package is presumed to be illegal, when it is distributed in the various States, and a pretty box competition? Is there any difference in those types of competition, in your estimation?

A. Yes, sir, there certainly is.

Q. And what is that difference, if you can explain it to us?

A. It is built up around, first of all, the legality of the method, and in the second place by good merchan-

dising practice. Our position is that the draw package as such is not good merchandising practice, regardless of whether it is legal or illegal.

Q. Why do you think it is not good practice?

A. Because all consumers are not treated alike. There are more losers than winners.

Q. When you say it is not good practice do you refer to the candy industry as a whole, or to your business alone?

A. I refer to the candy industry as a whole.

Q. What is the New England's organization's name?

A. The New England Confectioners' Association.

Q. Are you a member of that organization?

A. Yes, sir.

Q. Are you an officer of it?

A. I have just been elected a vice-president; yes, sir. I have not started to function yet.

Q. Mr. Mohun asked you with regard to your examination of the Keppel package. Have you made a study of this type of package?

A. Yes, sir.

Q. Have you examined a number of these so-called draw packages?

A. Yes, sir.

Q. How did they compare with Keppel's packages?

A. Well, I have got some figures here.

Q. Possibly, without going into the details of the particular packages—those figures might not be admissible—for the moment can you answer the question generally, Mr. Chapman?

A. Well, some of them contained more weight than Keppel's package. I think there are one or two that are slightly under his total weight. His total weight of that package is four pounds, fourteen and three-quarter ounces.

MR. MOHUN: I must object. I cannot see that the weight of goods in this package has anything to do with the weight of Keppel's package.

THE WITNESS: That is Keppel's package.

MR. MOHUN: I think the question is vague and uncertain. I do not know what is meant by the words, "Have you made a study of these other packages"? I think it is clearly irrelevant.

EXAMINER ALVORD: The objection is overruled.

MR. MOHUN: I would like to note an exception.

Q. Had you finished your answer?

A. Well, if I can go ahead with this, I would like to explain what I meant. A study is an examination. We go out and buy the package on the open market, and we bring it in and examine it, and we make comparisons of value in the various packages so examined, and then we compare those values as to weights with the same amount of money sales at retail of the regular, legitimately packed penny goods with no draw features, and in that way we establish very clearly that these draw packages do not give the consumer the legitimate value to which they are entitled, and out of every package there are 180 losers and twenty winners in the draw packages.

In the regular purchase of penny goods nobody loses, because they get full value for their money.

We have also noted in the examination of these packages that some of the so-called five-cent bars which are offered as premiums are not up to the standard weight of the regular five-cent bars. We have one package over here showing a ten-cent box offered as a prize, and it is marked "four ounces." It contained exactly three ounces of candy. So there is an underweight feature to the prizes, as well as an undervalue feature in the pieces sold to the losers.

Q. Does that situation that you have detailed have an effect on the straight candy business, or on the candy business as a whole?

A. Yes, it interferes with the sale of the regular goods because of the chance feature connected with these draw packages having a sales pull with the kid that goes in to spend his penny. He likes to take a chance. He doesn't have to be taught the thrill of that. That seems to be inherent in everybody. Nevertheless it is not good merchandising, and it is not a good thing to encourage the instinct in him.

Q. Did you state how those packages that you examined of the so-called draw type of candy, and the packages of straight goods, compared with each other?

A. You mean in weight?

Q. In value. We will put it that way.

A. Our estimate is that the draw package offers the losers, of whom there are 180 in every box, about half value.

(Witness excused.)

LEONARD HORACE HICKS, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. LANK:

Q. State your full name, please, Mr. Hicks.

A. Leonard Horace Hicks.

Q. Where do you live, Mr. Hicks?

A. 35 Pemberton Street.

Q. In what city?

A. Cambridge.

Q. What business are you in, Mr. Hicks?

A. Jobbing confectionery.

Q. Where?

A. In and around greater Boston.

Q. How long have you been in that business?

A. Sixteen years the first of last September.

Q. In your business do you handle at the present time the so-called draw packages, or break and take packages?

A. Yes.

Q. Do you handle any of the draw packages or break and take packages manufactured by R. F. Keppel?

A. That I couldn't say. I don't believe I ever had one of Keppel's.

Q. Have you always handled draw packages since you have been in the business?

A. No, sir.

Q. Will you tell us for what period you have not handled them?

A. Up to two years ago I did not carry any at all, because I was against it in principle, and I saw that the legitimate trade was handicapped when the prize packages were in the case; the legitimate business did not go at all.

Q. Did you then begin to distribute prize packages?

A. Not a great deal, only just where I had to in order to meet competition.

Q. Why did you do that?

A. Because it would mean a loss of revenue to me.

Q. I did not quite hear your answer.

A. It meant a loss of business to me because of the fact that if I did not have the prize packages they would not take the other goods.

Q. Can you explain that just a little more fully, Mr. Hicks, if you did not have the prize packages they would not take the other goods?

A. Yes. I was told they wanted to trade with a man that carried everything they wanted, and if I

did not have the prize packages there was no more need of my spending my time and wasting their time.

Q. Do you call on the retail trade, Mr. Hicks?

A. Yes, sir.

Q. Have you been in the retail stores?

A. Yes, sir.

Q. Have you seen the break and take packages on display?

A. I have.

Q. Have you seen purchases being made of candy in the stores?

A. I have.

Q. Did you observe a preference in the purchase of the candies?

A. Most always.

Q. What was that preference?

A. For the prize, for the prize candy.

Q. Generally speaking, what type of purchasers were buying the candy at the time you saw them?

A. Children.

Q. Could you tell about how much they were spending at a time?

A. Well, from one to ten cents. That is the extent of what I have seen, from one to ten cents.

Q. And could you form any opinion as to the ratio of what they spent for so-called straight candies to what they spent for so-called draw candies?

A. Yes; it would be at least fifty to one.

Q. When you began to distribute these packages did that affect your business at all?

A. Well, it brought me back into the good graces of the storekeepers where I would not previously carry them for them.

Q. Did it affect your income at all?

A. Certainly.

Q. I don't know whether you stated it or not, but will you state why you did not handle these packages from the beginning?

A. It was against my principles. I did not believe in it, because I saw that the legitimate business fell off.

CROSS-EXAMINATION.

By MR. MOHUN:

Q. Your testimony, I believe, Mr. Hicks, relates only to Boston? Is that where you distribute?

A. Yes, sir.

Q. Do you want the Federal Trade Commission to understand that from your observation the sale of straight goods is fifty times greater—I beg pardon—I mean the sale of draw candies is fifty times greater than the sale of straight goods?

A. I want it thoroughly understood that this applies to the time when the children come out of school and rush into the stores. That is generally the time that I saw most of the prizes being sold.

Q. Mr. Hicks, your answer is interesting, but entirely unresponsive. I asked you very distinctly whether you wish the Federal Trade Commission to understand that from your observation—and you testified generally that you had watched children?

A. Yes.

Q. That fifty times as many draw goods were sold as straight goods?

A. Yes, sir.

Q. You have only handled draw goods for the last two years?

A. That is all.

Q. Fourteen years prior to that you did not handle them?

A. I did not believe in it.

Q. It was contrary, I believe, to your principles?

A. Yes, sir.

Q. Have your principles changed?

A. Not at all.

Q. But you do handle them now?

A. Handle them. As I stated before, it meant a loss of revenue to me.

Q. And it is your purpose to continue to handle them, I suppose?

A. I would like to see them entirely cut out.

Q. I did not ask you that. You know what I asked you, Mr. Hicks. I asked you if it was your intention to continue to handle draw pieces?

A. As long as my competitors do.

RE-DIRECT EXAMINATION.

By MR. LANK:

Q. Mr. Hicks, you said it meant a loss of revenue. Can you explain that, or can you tell us how great a loss of revenue it meant to you?

A. Why, I believe in the years I did not carry them I lost thousands of dollars.

(Witness excused.)

EXAMINER ALVORD: The case is adjourned, to be resumed at Washington on the sixteenth day of October, at ten o'clock in the forenoon, at which time it is understood that counsel for the Commission will be prepared to say whether they are through or not.

MR. ROWLAND: Yes, sir.

(Whereupon the hearing was adjourned, to be resumed at Washington, D. C., on October 16, 1930, at 10 o'clock A. M.)

MEMORANDUM FOR CHIEF TRIAL EXAMINER.

Re: Docket 1816.

R. F. Keppel & Bro., Inc.

I am in receipt of the following letter from the attorneys for the above-named respondent under date of December 8, 1930:

> "Referring to the hearing set for the taking of testimony in this case on behalf of the respondent on the 15th proximo in Philadelphia, we beg to state that respondent does not desire to present any further evidence."

In accordance with the foregoing letter, the taking of testimony in the above-named matter is closed.

Respectfully,

E. C. Alvord,
Trial Examiner.

December 9, 1930.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.

(Filed January 25, 1932.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 4835.

R. F. Keppel & Brother, Inc.,
Petitioner,

v.

Federal Trade Commission,
Respondent.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, R. F. Keppel & Brother, Inc., respectfully represents:

That it now is and has been for a period of more than five years next preceding the filing of this petition a corporation duly organized and existing under the laws of the State of Pennsylvania, having its factory, office and principal place of business in Lancaster, Pennsylvania, and that said business consists chiefly of the manufacture of candy and the sale thereof to wholesale dealers and jobbers. In addition, petitioner buys and sells candies manufactured by others.

That on the second day of May, 1930, the Federal Trade Commission issued its complaint against your petitioner alleging in substance that your petitioner's method and practice of distributing its candies in interstate commerce was in violation of Section 5 of an act

of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes" and calling upon your petitioner to make answer and show cause why an order should not be entered by Federal Trade Commission requiring your petitioner to cease and desist from the violations of law charged in said complaint. A true copy of said complaint is hereto attached, made a part hereof, and marked "Exhibit A."

Within the time prescribed by said Commission, your petitioner filed its answer to said complaint denying generally and specifically the material allegations of said complaint charging violations of the section of the statute in said complaint specified; and also alleging certain affirmative grounds in defense and justification of the business methods and practices of your petitioner in the distribution of its candies in interstate commerce. A true copy of said answer is hereto attached, made a part hereof and marked "Exhibit B."

That upon the issues thus joined testimony was taken before an examiner of said Commission in the cities of Washington, District of Columbia; Baltimore, Maryland; Philadelphia, Pennsylvania; New York, New York; and Boston, Massachusetts; between the thirtieth day of September, 1930, and the tenth day of October, 1930, which said testimony and the exhibits filed in connection therewith will more fully appear upon the filing of a transcript of the record of said cause by Federal Trade Commission in this Court as by statute provided, and which evidence your petitioner prays may be deemed a part of this petition to the same intent and purpose as if same were herein set out in full and upon said evidence and briefs filed on behalf of petitioner and said Federal Trade Commission, said cause was submitted to said Commission and by the Commission taken under advisement.

That thereafter and on the twenty-eighth day of September, 1931, Federal Trade Commission made its "Findings as to the Facts and Conclusion" and on said date issued and caused to be entered in said cause its order directing your petitioner to cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, or retail dealers, packages or assortments of candy which are used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(3) Selling and distributing pieces of candy containing coins or pieces of money, which said pieces of candy are packed and assembled in packages or assortments with other pieces of candy of similar size, shape and quality not containing coins or pieces of money, for resale to the public by retail dealers.

(4) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape and quality containing within their wrappers tickets bearing different prices, or bearing the word "free," or phrases containing said word.

(5) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of chocolate-covered candy of uniform size, shape and quality, having centers of different color, together with larger pieces of candy, or articles of merchandise, which said larger pieces of candy, or articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(6) Furnishing to wholesale dealers, jobbers and retail dealers, display cards, either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchaser that the candy or candy products are being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(7) Furnishing to wholesale dealers, jobbers and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products, which said advertising literature informs the purchasers and purchasing public:

(a) That certain pieces of candy in a package or assortment contains coins or pieces of money which are given as prizes to the purchaser of the particular piece of candy.

(b) That certain bars of candy of uniform size, weight and quality may be obtained, free of charge, or for a price of one cent, two cents, three cents, four cents or five cents, depending upon the price tag enclosed in the wrapper of the piece of candy selected by the purchaser.

(c) That upon the obtaining by the ultimate purchaser of a piece of candy with a particular colored center, that a larger piece of candy, or other article of merchandise, will be given free to said purchaser.

(d) That upon purchasing the last piece of candy in the package or assortment, a larger piece of candy, or an article of merchandise will be given as a prize.

A true copy of said findings as to the facts and conclusion, and said order to cease and desist are hereto attached, made a part hereof and marked "Exhibit C."

That on the twenty-eighth day of November, 1931, and within the time specified in Federal Trade Commission's said order, your petitioner filed with said Commission its notice of intention to appeal.

Your petitioner further represents that said order to cease and desist is erroneous, unauthorized and insufficient in law, and should be reviewed, reversed and set aside for many apparent errors and imperfections, inasmuch as it appears from the record in said cause, as follows:

I. The Federal Trade Commission was without jurisdiction to hear, consider and determine the matters and things in its said complaint contained, for

(a) The matters and things alleged in said complaint did not constitute unfair competition within the meaning of that term as employed in Section 5 of the Federal Trade Commission Act, and the Commission erred in finding that the sale and distribution by your petitioner of its candy has been conducted in such way as to prejudice and injure the public and its competitors and has resulted in the diversion of trade to your

petitioner from its competitors, and is a restraint upon and detriment to the freedom of fair trade in the candy industry whereas in truth and in fact there was insufficient evidence for said Federal Trade Commission to make said findings but there was evidence to show that the great majority of the candy manufacturers of the United States has long employed the distribution methods involved in this proceeding, and less than 15 per cent. (15%) of those in the trade now use other methods.

(b) The Federal Trade Commission erred in alleging that the issuance of complaint in this case and proceedings thereunder would be to the interest of the public, for the record completely fails to show that substantial and specific public interest required under the decisions of the courts as a prerequisite to jurisdiction of the Commission; and your petitioner further avers—and this was admitted by said Federal Trade Commission upon the record—that your petitioner has never employed fraud, deceit, or bad faith in the sale of its goods and has no intention to deceive the public or its competitors, and the complaint against your petitioner makes no such allegations; and your petitioner therefore avers that there is an utter absence of injury to the public.

(c) The complaint issued by said Federal Trade Commission alleges substantially the conduct by your petitioner of a lottery, whereas said Federal Trade Commission has no jurisdiction to enforce the anti-lottery statutes of the United States or of the several States, and hence it was error and not material to this cause for the Commission to find that the sale and distribution of candy by lot or chance was against the public policy of "many" of the States and that "some" of the States have such laws. Further, that such find-

ing must fail for lack of definiteness for the Commission does not find that the States in which your petitioner does business are among those States having such policy and such laws.

(d) That the candy assortments sold by this petitioner lose their distinctive character as articles of interstate commerce when such packages are opened for sale and said Federal Trade Commission has no jurisdiction over such candy assortments in the hands of the retail dealer; nor does your petitioner retain any control over the goods after they have been delivered to the wholesaler or jobber.

II. The "Findings as to the Facts and Conclusion" of the Federal Trade Commission are not supported by the evidence, in the following particulars:

(a) There was no proof in this record of the following sentence which appears as the final sentence of the first paragraph of paragraph eight, which reads:

> . . . An examination of the packages or assortments of candy described in paragraphs 2, 3, 4 and 5, herein, as packed, assembled, and sold by respondent shows that said packages or assortments cannot be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble or rearrange the said packages or assortments.

(b) There is no proof in this record of the following sentence which appears as the last paragraph of paragraph eight, which reads:

> In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers, and to retail dealers direct, of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, 4 and 5 herein, respondent has knowledge that said candy will be resold to the

purchasing public by retail dealers by lot or chance, and it packs and assembles such candy in the way and manner described, so that it may and shall be resold to the public by lot or chance by said retail dealers.

(c) There is no proof in this record of the first and final sentences of the last paragraph of paragraph nine, which read:

> The sale and distribution of candy by lot or chance provides an easy means of disposing of such products . . . The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

III. The findings as to the facts of the Commission omit certain material portions of the record which were the basis of the following findings by the Trial Examiner:

(a) From paragraph VII of said Trial Examiner's report:

> The demand in the trade for the "Break and Take" goods comes from the smaller dealers. The chain stores and other large retailers, such as the five and ten-cent stores, sell large quantities of straight goods at prices which the small retail dealer cannot meet, therefore, he turns to "Break and Take" goods in order to draw trade to his store (R., pp. 50, 70).

(b) From paragraph VIII of said Trial Examiner's report:

> Respondent was requested to discontinue the manufacture and sale of the "Break and Take" packages about the year 1925 (R., p. 42) and it did

so at that time, but because other candy manufacturers continued to make and distribute "Break and Take" goods, respondent's volume of business in its manufactured goods shrunk to such an extent that it felt that in order for it to continue in the business of manufacturing candy it was necessary for it to restore the "Break and Take" package which it did, resulting in sufficient additional volume, so that its business showed a profit (R., p. 73).

(c) From paragraph VIII of said Trial Examiner's report:

> All sales made by the respondent of its "Break and Take" packages are absolute sales, that is, the respondent retains no control in any manner over the goods after they are delivered to the wholesaler or jobber (R., p. 54).

(d) From paragraph VIII of said Trial Examiner's report:

> No candy manufacturer who puts out a "Break and Take" package has complained to respondent concerning its manufacture or sale of this type of merchandise, but those manufacturers who do not make and distribute anything but "Straight Goods" have complained to the National Confectioners Association (R., pp. 38, 59).

(e) From paragraph IX of said Trial Examiner's report:

> There is no evidence in the record that any competitor of the respondent has been injured in his business by reason of the "Break and Take" product manufactured and distributed by respondent, other than that which shows that the business of all candy manufacturers who make only "Straight Goods" is injured by all "Break and Take" goods on the market.

IV. The findings as to the facts and conclusion and order of the Commission exceed the scope of the complaint in the following respects:

(a) It is not averred in the complaint, and the Commission erred in finding, that your petitioner sells and distributes its candy assortments and/or display cards directly to retail dealers; and such findings embodied in and made a part of paragraphs enumerated (1), (2), (6) and (7) of the order to cease and desist of said Commission render said paragraphs of said order unlawful and invalid because they exceed the terms of the complaint in which no charge is made that your petitioner distributes its candies or supplies display cards to retail dealers.

(b) It is not averred in the complaint, and the Commission erred in finding, that your petitioner employs any gaming device or gift enterprise in the distribution of its candies; and such findings in paragraphs enumerated (1), (2) and (6) of the order to cease and desist of said Commission invalidates and voids said paragraphs of said order because said paragraphs exceed the scope of the complaint, in which no charge is made of the employment by your petitioner of any gaming device or gift enterprise.

V. It was immaterial to the issues of this case, and it was error for the Commission to include in its order paragraphs enumerated (4) and (5) wherein your petitioner is sought to be compelled to desist from packing or assembling in the same packages or assortments of candy for sale to the public at retail candies containing tickets bearing different prices or the word "free" or candies with centers of different color or articles of merchandise or larger pieces of candy to be given as prizes, for said Federal Trade Commission is without jurisdiction of the packing and assembling by your petitioner of any of its candy assortments, which operations are not commerce, either interstate or intrastate, but manufacture; and hence

said paragraphs enumerated (4) and (5) of said order to cease and desist are invalid and void.

VI. That the Commission further erred, in paragraph enumerated (3) of said order, in directing your petitioner to cease and desist from selling and distributing pieces of candy containing coins or pieces of money which are packed with other candies of similar size, shape and quality not containing coins or pieces of money for resale to the public by retail dealers, because such practice has long existed in the candy industry and is unfair neither to the public nor to competitors.

VII. The Commission erred generally in issuing herein its order to cease and desist directed to your petitioner because such order is contrary to law, is inequitable and unjust in that

(a) Said order is not uniform in its application and works a preference for those against whom an order has not been made and for those whom the Commission has not sought to exercise its jurisdiction.

(b) The order of the Commission tends to restrain and restrict trade, restrict competition, and produce a monopoly.

VIII. The Commission erred in issuing and promulgating its order against your petitioner until it had heard and determined all the causes of like character pending before the Commission.

For all of the above errors and imperfections in said order of the Commission to cease and desist appearing upon the face of the record in said cause, your petitioner has brought this petition for review to be relieved in the premises.

Forasmuch, therefore, as your petitioner is without remedy in the premises except in this court, as by statute in such case made and provided, and to the end that said Federal Trade Commission may be required to certify and file in this court a transcript of the record of said cause as provided by statute, and that the said order to cease and desist may be reviewed, reversed and set aside and no further proceedings taken thereon, and that your petitioner may have such other and further relief in the premises as the equities of the cause may require and as to your honors may seem meet,

May it please your Honors to have a copy of this petition forthwith served upon said Federal Trade Commission and that said Federal Trade Commission be required, upon service of such copy, to forthwith certify and file in this court a transcript of the record of the said cause.

R. F. KEPPEL & BROTHER, INC.,

By

JOHN A. COYLE,
GEO. E. ELLIOTT,
Its Counsel.

JOHN A. COYLE,
Lancaster, Pennsylvania,
GEO. E. ELLIOTT,
Shoreham Building,
Washington, D. C.,
Of counsel.

EXHIBIT "A."

Attached to Petition to Review Order of Federal Trade Commission.

This is a copy of the original bill of complaint of the Federal Trade Commission and will be found printed in full at pages 2 to 3 of this record.

EXHIBIT "B."

Attached to Petition to Review Order of Federal Trade Commission.

This is a copy of the original answer of R. F. Keppel & Brother, Inc., to the bill of complaint of the Federal Trade Commission, and will be found printed in full at pages 8 to 9 of this record.

EXHIBIT "C."

Attached to the Petition to Review Order of Federal Trade Commission.

This is a copy of the original findings as to the facts and conclusion of the Federal Trade Commission and will be found printed in full at pages 12 to 24 of this record.

ORDER TO CEASE AND DESIST.

Attached to the Petition to to Review Order of Federal Trade Commission.

This is a copy of the original order to cease and desist by the Federal Trade Commission and will be found printed in full at pages 25 to 28 of this record.

ORDER AUTHORIZING FILING AND SERVICE OF PETITION TO REVIEW AND DIRECTING FEDERAL TRADE COMMISSION TO CERTIFY AND TRANSMIT RECORD.

(Filed January 25, 1932.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 4835.

R. F. Keppel & Brother, Inc.,
Petitioner,

v.

Federal Trade Commission,
Respondent.

On this day comes R. F. Keppel & Brother, Inc., a corporation, petitioner, by its attorneys, John A. Coyle and George E. Elliott, and presents this petition to review an order to cease and desist entered against the petitioner by the Federal Trade Commission on the twenty-eighth day of September, A. D. 1931, in a cause pending before the said Commission, entitled Federal Trade Commission v. R. F. Keppel & Brother, Inc., bearing Docket No. 1816.

The Court being advised in the premises, it is ordered that said petition to review be filed and that a copy of said petition be forthwith served upon said Federal Trade Commission and that said Commission upon service of such copy forthwith certify and file in this court a transcript of the record in said cause.

Dated at Philadelphia, Pennsylvania, this twenty-fifth day of January, A. D. 1932.

BUFFINGTON,
Circuit Judge.

DOCKET 1816

IN THE MATTER OF

R. F. KEPPEL AND BROTHER, INC.

Part 2

Exhibits

SEAL OF
FEDERAL TRADE COMMISSION

COMMISSION'S EXHIBIT NO. 1.

Box—Royal Confections—"Chocolate Penny Men 120s" Manufactured by R. F. Keppel & Bro., Inc. (3 Parts).

(Filed Separately.)

Marked: 1

1816

(Physical Exhibit.)

COMMISSION'S EXHIBIT NO. 2.
(Display Card.)

Watch This Boy
He Has Money
In His Pockets

Com Ex 2 -

DOCKET No 1816 COMMISSION'S EXHIBIT No 2
IN THE MATTER OF R J Keppel & Bro
DATE 9/30/30 WITNESS Roy Brueber

(Display this card by putting it in end of Box. It will help your sales)

COMMISSION'S EXHIBIT NO. 3.
(Box Label.)

THESE GOODS MANUFACTURED BY
R. F. KEPPEL & BRO., Inc.
LANCASTER, PA.
and must meet with your entire satisfaction in every way
THIS BOX PACKED BY No. 76
Please notice the extra fine quality of these goods.
If any complaint about count or other cause is made this ticket must accompany the claim.

COMMISSION'S EXHIBIT NO. 4.

Box—Royal Confections—"1-2-3 Big Chief 60s"—Manufactured by R. F. Keppel & Bro., Inc. (4 Parts).

(Filed Separately.)

Marked: 2

1816

(Physical Exhibit.)

COMMISSION'S EXHIBIT NO. 3.
(Box Label.)

THESE GOODS MANUFACTURED BY
R. F. KEPPEL & BRO., Inc.
LANCASTER, PA.
and must meet with your entire satisfaction in every way
THIS BOX PACKED BY NO. 76
Please notice the extra fine quality of these goods.
If any complaint about count or other cause is made this ticket must accompany the claim.

Can You Find the Big Chief's Bars?

KEPPEL'S

BIG-CHIEF

PEANUT CHEWS

THIS BOX CONTAINS

10 Bars at 1c each 10 Bars at 2c each 40 Bars at 3c each

Comm'n No 5

DOCKET No 1816 COMMISSION'S EXHIBIT No 5

IN THE

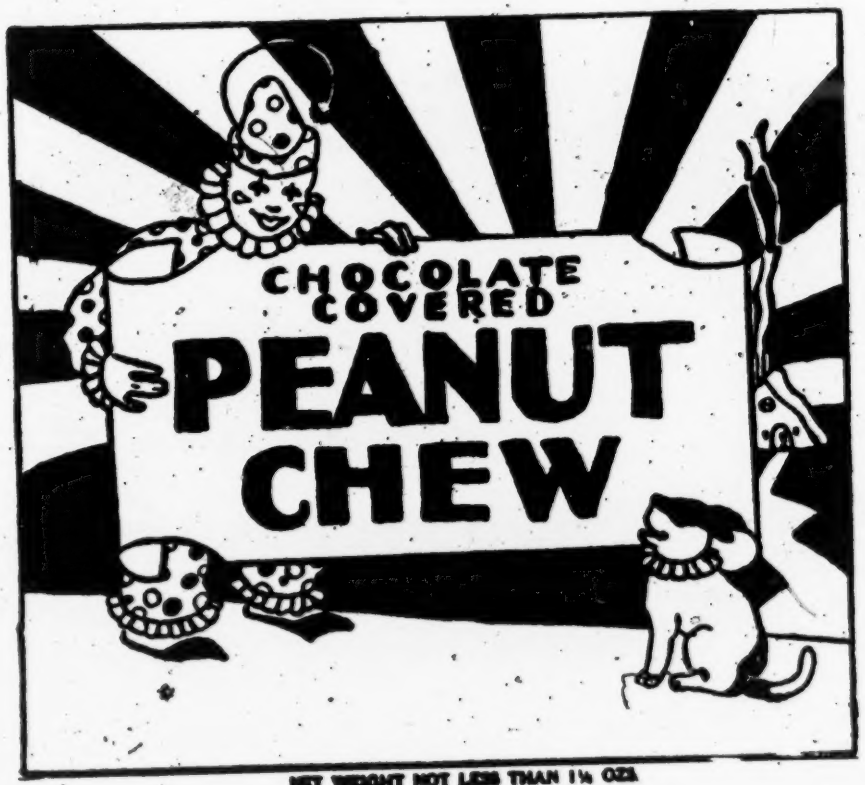
DATE 9/20/30 WITNESS

REPORTER

MR. DEALER:—DISPLAY THIS SALES GETTER IN END OF BOX AND WATCH THIS QUALITY CANDY GO

COMMISSION'S EXHIBIT NO. 5.
(Display Card.)

COMMISSION'S EXHIBIT NO. 6.
(Candy Wrapper and Price Cards.)



NET WEIGHT NOT LESS THAN 1½ OZS.
R. F. KEPPEL & BRO. INC.
LANCASTER, PA.

DOCKET No 1816 COMMISSION'S ~~RESPONDENT'S~~ EXHIBIT No 6
IN THE MATTER OF R. F. Keppel & Bro
DATE 9/30/30 WITNESS Rowland Brenham
REPORTER

1c

2c

3c

1816-4 Section 6 Shelf 4

Can You Find the Big Chief's Bars?

KEPPEL'S

BIG-CHIEF

PEANUT CHEWS

8-2 1816-4

4-7 1-4326

THIS BOX CONTAINS

3 Big Chief's Bars FREE. 5 Bars at 1c Each. 5 Bars at 3c Each.

5 Bars at 4c Each. 22 Bars at 5c Each.

DOCKET No. 1816 COMMISSION'S EXHIBIT No. 7

IN THE MATTER OF R. F. Keppel & Bro.

DATE 9/30/20 WITNESS Louis Brewer

Com'n No. 7

MR. DEALER:—DISPLAY THIS SALES GETTER IN END OF BOX AND WATCH THIS QUALITY CANDY GO

COMMISSION'S EXHIBIT NO. 7. (Display Card.)

COMMISSION'S EXHIBIT NO. 8.

Box—"School Days 200s" (5 Parts).

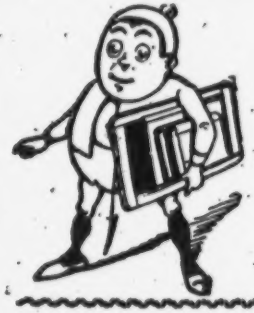
(Filed Separately.)

Marked: 3

1816

(Physical Exhibit.)

COMMISSION'S EXHIBIT NO. 9.
(Display Card.)



SCHOOL DAY ASSORTMENT

1 Piece of Cream With White Center 1¢

1 Piece of Cream with Pink Center and School Boy or Girl 1¢

1 Piece of Cream With Chocolate Center and Set of Twins 1¢

Last Piece of Cream and School Companion 1¢

Com Ex # 9 9

DOCKET No. 876 COMMISSION'S ~~RESPONDENT'S~~ EXHIBIT No. 9

IN THE MATTER OF R. J. Reynolds Tobacco Co.

DATE 9/30/30 WITNESS Raul Brewer

REPORTER

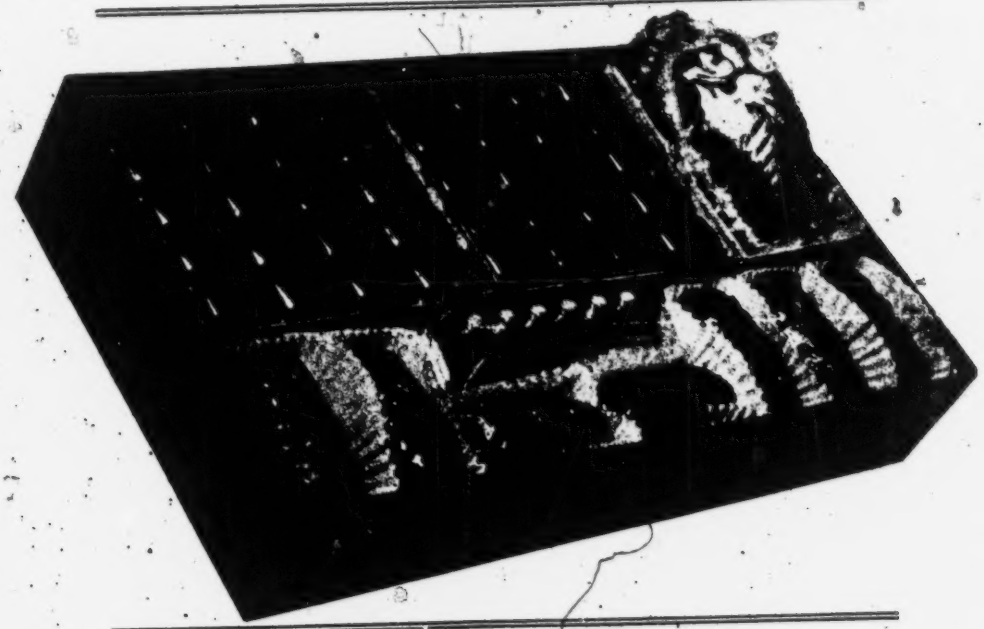
COMMISSION'S EXHIBIT NO. 10.
(Advertisement.)

Keppel's

EGG ASSORTMENT

200 COUNT

14—Pink Centers Each Taking a Large HAND ROLLED EGG.
1—Chocolate Center Taking Mouth Organ.
1—Large Cellophane Wrapped Decorated Cocoanut Cream Egg With Last Sale.



Please Notice this Assortment is Something Entirely New, Having 14 Hand Rolled Cocoanut Eggs of Exceptional Quality.

A Mouth Organ as well as an Extra Fine Cocoanut Cream Egg for Last Sale.

R. F. KEPPEL & Bro., Inc., Lancaster, Pa.

"Originators of Fine Assortments"

(Detach Along This Line and Use for Salesmens Sample)

PACKED 14 BOXES TO A CARTON

Price $1.00 for 200s, Freight Allowance up to 50c Per Cwt. Pounds

To Please Your Customers Push Keppel's Goods

DOCKET No. 1816 COMMISSION'S EXHIBIT No. 10
IN THE MATTER OF R. F. Keppel & Bro.
DATE 9/30/30 WITNESS Roy Brewer

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4835. October Term, 1932

R. F. KEPPEL & BROTHER, INC., PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

And afterwards, to wit, the 13th day of October, 1932, come the parties aforesaid by their counsel aforesaid, and this case being called for argument on pleadings and briefs, before the Honorable Victor B. Woolley, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 25th day of January, 1933, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

179066—33

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 4835. October Term, 1932

R. F. KEPPEL & BROTHER, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

UPON PETITION to review order of the Federal Trade Commission

Opinion

Filed January 25, 1933

Before WOOLLEY, DAVIS, and THOMPSON, Circuit Judges

THOMPSON, Circuit Judge.

This is a petition to review an order of the Federal Trade Commission requiring the petitioner to desist from certain of its trade practices. The petitioner manufactures, sells, and distributes in interstate commerce certain packages or assortments of candy. Each assortment is accompanied by a display card designed to be used by the retailer. One assortment known as "Chocolate Penny Men 120's" is composed of one hundred and twenty chocolate covered candies, identical in appearance, four of which conceal pennies placed there by the petitioner at the time it manufactures and packs the assortment. The purchaser pays one cent for the individual pieces of candy. Four of the one hundred and twenty purchasers regain their money by obtaining the pieces which contain the

pennies. Another assortment bears the name "1, 2, 3 Big Chief 60's" and consists of peanut bars wrapped in paper. Enclosed in the wrapper is a ticket showing the retail price to be paid by the purchaser. This may be one, two, or three cents. It cannot be known, until the candy is unwrapped, what price the purchaser must pay for the particular piece. The third assortment "School Days 200's" consists of two hundred chocolate covered creams of a uniform size and shape, which retail at one cent each. Of these the centers of eight are pink, four are chocolate, and the remainder are white. Packed with the creams are eight pieces of chocolate candy representing a boy or girl, and four double pieces representing twins. The package contains, in addition, a "school companion". For a cream with a pink center, the purchaser receives the chocolate boy or girl; for a chocolate center, the twins; and for the last piece in the box, the "school companion". This is a fairly complete outline of the three sales plans in use by the petitioner.

The Federal Trade Commission filed a complaint in which it charged the petitioner with selling and distributing its candy by means of a sales plan or method which constitutes a lottery. Testimony was taken and the Commission concluded that the sales plans which we have described are, in effect, games of chance, that they are against public policy, and that they constitute unfair competition in commerce. The Commission ordered the petitioner to cease and desist from the use of such practices.

Congress has exclusive control over the regulation of commerce among the states. The manner in which it exercises this constitutional power is not limited. It may regulate commerce by means designed to promote

the public welfare and in matters which are ordinarily within the police powers of the states. *Lottery Case*, 188 U.S. 321; *Hoke* v. *United States*, 227 U.S. 308; *Caminetti* v. *United States*, 242 U.S. 470. Congress, therefore, had power, had it seen fit, to prohibit business methods such as are practiced by the petitioner. The contention of the respondent is that Congress has done so in section 5 of the Federal Trade Commission Act (15 U.S.C.A. 45), which provides:

> "Unfair methods of competition in commerce are declared unlawful.
>
> "*Power to prohibit.* The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

The Act contains no definition of the words "unfair methods of competition in commerce" and their meaning must therefore be arrived at through a reasonable construction of the language used.

In a recent case in the Second Circuit (*Northam Warren Corporation* v. *Federal Trade Commission*, 59 F. (2d) 196) complaint was made to the Federal Trade Commission by a trade competitor that the respondent was using testimonials for advertising purposes for which it had paid, and that that fact was not disclosed to its customers. The Commission, holding that this was an unfair method of competition in commerce issued a "cease and desist" order, from which the respondent appealed. Although the acts of the respondent may have been unethical and deceptive in that the purchasing public was not informed that the judgment of those giving the testimonials may have been influenced by a money consideration, we are

in accord with the reasoning of the court in reversing the order of the Federal Trade Commission. We quote from Judge Manton's opinion:

> "The Federal Trade Commission Act (15 U.S.C.A. 41–51) does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade. Even if a practice may be regarded as unethical, it would still be beyond the purview of the act if it lacks the public interest necessary to support the Commission's jurisdiction. *Federal Trade Comm.* v. *Klesner*, 280 U.S. 19, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838. The Commission does not suggest that these testimonials tend to create a monopoly; they do not have a tendency to create an undue restraint of trade. The strongest argument the respondent makes is that failure to state the price paid for the testimonial amounts to deception and misrepresentation concerning the petitioner's product and in that way the petitioner is able to deprive honest manufacturers of a market. *Federal Trade Comm.* v. *Winsted Hosiery Co.*, 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729. But where unlawful restraint of trade has been ordered to be discontinued it has always appeared that there was some dishonesty in labeling or marketing the goods. *Federal Trade Comm.* v. *Winsted Hosiery Co., supra; Guarantee Veterinary Co.* v. *Federal Trade Comm.*, 285 F. 853 (C.C.A. 2); *Royal Baking Powder Co.* v. *Federal Trade Comm.*, 281 F. 744 (C.C.A. 2); *Procter & Gamble* v. *Federal Trade Comm.*, 11 F. (2d) 47 (C.C.A. 6). In order that the Commission proceed in the public interest, the courts have insisted not

> only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby. *Federal Trade Comm.* v. *Klesner, supra.*"

Practices which tend to hinder competition or create monopoly are against public policy just as practices which are characterized by deception, bad faith, fraud, or oppression are against good morals, but not all practices which are opposed to good morals or public policy amount to unfair methods of competition within the meaning of the Federal Trade Commission Act. *Federal Trade Comm.* v. *Gratz*, 253 U.S. 421; *Federal Trade Comm.* v. *Raladam*, 283 U.S. 643.

The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. Other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner. The testimony shows that a decided majority of candy manufacturers did in fact use similar methods. There is nothing in the petitioner's practices tending to hinder competition or create monopoly.

The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer. Display cards sent by the petitioner to accompany the merchandise contain a complete, fair, and accurate description of the sales plans. The consumer receives a piece of candy for his cent and, although he knows that the quantity is relatively less

than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for his opportunity to obtain a prize.

We conclude that, upon a reasonable construction of the Federal Trade Commission Act, the Commission was without jurisdiction to make the "cease and desist" order brought here for review.

The order of the Commission is reversed.

WOOLLEY, Circuit Judge, dissenting.

I am constrained to dissent from the judgment of the court because of what I conceive to be a false strain that has run through the case from the beginning.

In little candy shops close to public schools, whose customers are small children and whose sales are of candy in small quantities at low prices, there has grown up a trade in "Break and Take" packages, described in the court's opinion. In all of these packages there is a single piece of candy; in a small number there is in addition money, a prize, or ticket giving a right to a prize or to a price advantage. Thus the child, not knowing the contents of a package, buys with its penny two things, candy and a chance of getting something else. Packages containing prizes and those not containing prizes are so arranged in number that the child loses in nearly every purchase. To be definite, in one plan it wins on an average of one time out of thirty. This business, based on the instinct to gamble—as natural in children as in adults—has grown amazingly, and with undesirable results, personal and commercial.

In proceedings before the Federal Trade Commission, that tribunal issued an order against R. F. Keppel & Bro., Inc., to cease and desist from the

practice on several findings, of which one was that it constituted an unfair method of competition in commerce; another that it amounted to a lottery and, accordingly, was against the public policy of the United States and of many states.

Unfortunately the Commission at the hearing and in its findings stressed gambling as against good morals and public policy and, again unfortunately, the argument in this court on the candymaker's petition for review, following the over-emphasis of the Commission, was directed to that phase of the matter as though it were an issue in the case—and the main issue. Still unfortunately, as I view it, the action of the Commission and the trend of the argument in that regard entered into and, in a different way, influenced the decision of the court when, as I look at the case, the decision has nothing to do with morals, business ethics, or public policy, but turns solely on questions, under the statute, of the Commission's jurisdiction in a matter of "public interest" and on the presence of evidence to support the Commission's finding of "unfair competition".

In order briefly to state my views I shall meet the four propositions presented by the petitioner as it has framed them:

> D. The Federal Trade Commission has no jurisdiction to enforce the Anti-Lottery Statutes of the United States and of the several states.

That is right.

> C. The petitioner's candy assortments were not articles of interstate commerce at the time of the employment of the sales' methods in question.

This proposition is based on the fact that the ultimate sales to the public are made by local retail dealers, and on the thought that the petitioner can, within the four walls of its factory, so dress and pack its candies that their sale to the public will involve an unlawful practice, and can, without further concern, sell them either directly to retailers or to wholesalers and jobbers in different states who, in turn, sell them to retailers. Then, when the retailers re-sell the candies to the public in the way the petitioner has made possible and has intended, the commerce is intrastate, not interstate, and the petitioner is in no sense responsible for its part in the transactions.

That is wrong.

B. The record completely fails to show a substantial and specific public interest.

Distinguished from matters of public policy, the Commission's jurisdiction concerns matters of public interest. If the methods of sale be unfair to the purchasing children, they are unfair to a part of the public, indeed to the whole of the public which purchases candy in small quantities at penny prices. If the methods of sale be unfair to competitors in the manufacture and sale of candies in the same trade, they are unfair to another part of the public. Stated crudely, there are in this case two publics, each with a different yet specific and substantial interest. To stay a wrong inflicted upon either by unfair methods of competition is clearly within the jurisdiction of the Federal Trade Commission.

A. There is an entire absence (of evidence) of unfair methods of competition as that term is used in the Federal Trade Commission Act.

This, I think, is the heart of the case, and aside from the question of "public interest" is the only question in the case. I shall briefly discuss it, first from the standpoint of candy purchasers, and then from the standpoint of candy competitors; the two classes of the public interested and affected.

Passing by all aspects of the sale methods in question which bear upon private morals, business ethics, and public policy, I shall inquire coldly into the trade or money side of the transactions. For illustration, take the "Chocolate Penny Men 120's" which are sold from a box containing 120 packages. Four have candy and a penny enclosed; 116 have candy alone. Or take the "1, 2, 3 Big Chief 60s" which are sold from a box containing 60 packages; 10 retailing for one cent each, 10 for two cents and 40 for three cents. The price is not known until the package is selected and on being broken open is revealed as one, two or three cents by a ticket enclosed. When the child makes a blind purchase of any of these candies, it pays for two things; first for the candy, and next for a chance, that is, as the child believes, a chance of getting something for nothing. The petitioning-manufacturer, however, takes no chance; it makes certain that it is paid for this "something" by shortening the quantity or lowering the quality of the candy in the blank package, which makes up for the penny pieces in one scheme and the lower prices in the other. In this way the child, getting less candy or inferior candy, pays more for candy in Break and Take packages than for candy in competing straight packages at the same prices. In other words, the child, paying its penny, does not get a penny's worth. In this, I think, it is unfairly dealt with. It is no answer to say that the child should discriminate and buy straight goods, for, as presently

will appear, the Break and Take packages have in most cases driven penny straight candies off the shelves of the shops. So the child must buy what is before it and, in doing so, is unquestionably deceived, or must go without, which with a penny in its pocket it is not likely to do.

Competition in commerce is a contest for trade. It is a fight; sometimes bitter, sometimes fatal. It is not unlawful merely because it is hard to meet or because, failing to meet it, one may be driven out of business. It is only unlawful when unfair. What constitutes unfairness varies with each case. An apposite illustration is the old trading stamp system whose conception and results were similar to those in the Break and Take packages of the petitioner. It, too, involved the delusion of getting something for nothing and has been regarded unfair and declared unlawful by the statutes of many states. There, also, two classes were affected, the purchasing public and the competing public.

Differing in a way that makes the trading stamp system look almost commendable, the petitioning candymaker in this case not only entered into competition for the penny candy trade with smaller candy units, but, stepping outside of commerce, injected into its competition a gamble which has made its competitors contest with it not only for the purchasing trade but for the speculating public. To sell their goods, its competitors have to compete with the petitioner not only in wares and prices but by devising and putting into practice more seductive gambling schemes. This, I think, is not commerce; it is merchandising chance instead of candy. Aside from any question of morals, I regard it unfair. This view is not an abstract conception but is based on the results of the petitioner's

competitive practice shown by the evidence to be as follows:

It developed that when penny and nickel "chance candies" are on sale with "straight goods", children almost universally select those involving a gamble. The result is that "straight goods" rarely sell over the same counter with "chance candies". So established is this observation that many keepers of small stores have ceased to buy and display "straight goods" for the penny trade. They sell only "chance candies." In consequence more than half of the manufacturers of penny candies in this country have gone into the trick trade. Many traveling salesmen for "straight goods" houses have complained of their inability to sell their wares in competition with "chance candies". Others have refused further to continue the effort and have threatened to seek employment elsewhere. One "straight goods" concern attributes to competition by "chance candies" a drop in its business of fifty per-cent in the sale of penny goods and twenty percent in the sale of nickel goods. Another concern manufacturing only "straight goods" lost some of its strong customers because, wanting "chance candies" as well, they preferred to buy both kinds at one place. Still another manufacturer who stuck to "straight goods" saw his business reduced eighty-five per cent by reason of this new type of competition. Two other manufacturers, "competing for the child's penny", declared that their refusal thus far to put a gamble in their candy packages has placed them at a distinct disadvantage. Another concern was "forced" to meet the petitioner's competition by putting out trick candy packages. It then discontinued the practice but later was forced to resume it, mainly because of "a howl set up by our salesmen

that they could not get the business". Again it stopped the practice and again it was forced to resume it in order not only to regain business in "chance candies" but to retain its business in "straight goods", as customers who still deal in candies of both kinds want to buy from one manufacturer or jobber. When it stopped selling "chance candies" its business fell off from forty to fifty per cent. When it started again, its business increased at once. Officers and salesmen of other companies testified to similar experiences, which apparently extend through the trade.

And, finally, there is evidence that candies in Break and Take packages are smaller in size, lighter in weight and inferior in quality, proving rather conclusively that children are imposed upon and that in competition with "straight goods" at the same prices the "chance" is the thing that makes the sales.

I am of opinion this evidence supports the Commission's finding of unfair competition and that that finding alone is enough to make valid the Commissions's order. I think it should be sustained.

A true Copy:
Teste:

Clerk of the United States
Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4835. October Term, 1932

R. F. KEPPEL & BROTHER, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

APPEAL from the Federal Trade Commission

This cause came on to be heard on the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Federal Trade Commission in this cause be, and the same is hereby, reversed.

Philadelphia, January 25, 1933.

J. W. THOMPSON,
Circuit Judge.

(Endorsements:) 4835. Order reversing order or decree. Rec'd & filed Jan. 25, 1933. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of R. F. Keppel & Brother, Inc., petitioner, *v.* Federal Trade Commis-

sion, respondent, 4835, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 15th day of February, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-seventh.

[SEAL.]

WM. P. ROWLAND,
Clerk of the U.S. Circuit Court
of Appeals, Third Circuit.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. ——

FEDERAL TRADE COMMISSION, petitioner

v.

R. F. KEPPEL & BROTHER, INC.

An order extending time within which to apply for a writ of certiorari

On consideration of the motion of counsel for the petitioner in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same hereby is, extended for a period of sixty days from this date.

Dated this 22nd day of April, 1933.

(Signed) OWEN J. ROBERTS,

Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Third Circuit, entered in this cause on January 25, 1933, which set aside the order of the Federal Trade Commission requiring the respondent, R. F. Keppel & Brother, Inc., to cease and desist from certain alleged unfair methods of competition.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 371) is reported in 63 F. (2d) 81.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 25, 1933 (R. 383). The time for

filing a petition for certiorari was duly extended on April 22, 1933, by order of one of the Justices of this Court to June 21, 1933 (R. 385). The jurisdiction of this Court is invoked under Section 5 (Paragraphs 4 and 5) of the Federal Trade Commission Act (*infra,* p. 23) and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the sale of merchandise in interstate commerce by a scheme or plan whereby it is not only merchandise but a gambling device as well, and which scheme or plan involves the sale of the merchandise not on the basis of quantity, quality, or price, and which further tends to restrain competition and injures competitors not using such a plan or scheme, is an unfair method of competition.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914), c. 311, 38 Stat. 717, 719, is set forth in Appendix A, *infra,* p. 23.

STATEMENT

The complaint issued by the Federal Trade Commission (R. 2–7) charged the respondent herein with the use of certain unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. The respondent answered this complaint (R. 8–9), and, after the taking of testimony before one of its examiners

(R. 29–332, 347–367), the Commission entered its findings of facts and conclusion (R. 12–24), which resulted in an order against the respondent to cease and desist from the practices complained of. Upon a petition for review (R. 333–346), this order was set aside by a majority of the court below, one judge dissenting (R. 371–382).

The Commission found as a fact that respondent manufactures, sells, and distributes in interstate commerce, to wholesalers, jobbers, and retailers, certain assortments of candy, in competition with other corporations, firms, and partnerships similarly engaged (R. 13). Among the assortments is one labeled "Chocolate Penny Men 120s", containing 120 pieces of chocolate-covered creams moulded in the shape of a man, retailing for one cent each. Four of the pieces of candy conceal pennies, placed there by respondent at the time it manufactures and packs the assortment. The four purchasers procuring the pieces containing pennies receive their money back, thereby getting their pieces of candy free. The purchaser has no way of telling which pieces contain pennies (R. 13–14).

Another assortment, consisting of peanut bars, is called "1, 2, 3 Big Chief 60s." This candy is packed in boxes containing 60 pieces each, ten of which retail at one cent, ten at two cents, and forty at three cents. The pieces of candy are of uniform size and quality, and are wrapped in nontransparent paper. Enclosed within the wrapper of each piece is a ticket bearing the retail price at

which the piece of candy is to be sold—either one cent, two cents, or three cents. The purchaser cannot tell until after selecting his piece of candy and removing the wrapper the price he will have to pay for it (R. 14–15).

A third assortment is called "School Days 200s," containing 200 pieces of chocolate-covered creams of uniform size and shape, retailing at one cent each. Of these the centers of sixteen are pink, four are chocolate, and the remainder are white. Also included in the package are eight chocolate-covered pieces of candy moulded into the shape of a girl, eight moulded into the shape of a boy, four double pieces moulded to represent twins, and a "School Companion," containing five lead pencils, a pen and penholder, a six-inch ruler, and two erasers. The purchaser procuring a piece of candy having a pink center receives, in addition to the piece of candy, one of the chocolate boys or girls; if he procures a chocolate center he receives one of the twins; and if he purchases the last piece in the box he receives the "School Companion." There is no way by which the purchaser can tell the color of the center until after he has purchased the piece of candy and broken it open (R. 16–17).

Packed in each assortment mentioned above is a display card prepared by respondent for use by the retailer in selling the candy, explaining and describing the plan for selling the candy by lot or chance, in the manner hereinbefore described (R. 14, 15, 16, 18).

The Commission found that, under the sales plan employed in connection with the above assortments, lot or chance alone determined whether the purchaser from the retailer received his piece of candy free of charge, paid one, two, or three cents for it, or received a prize or premium of a larger piece of candy, or an article of merchandise.

It found, also, that lottery or prize packages are generally referred to in the candy trade as "Break and Take" packages, and assortments without these features as "Straight Goods" (R. 17); that retailers purchase respondent's "Break and Take" packages either directly from respondent or from jobbers and wholesalers who in turn have purchased them from respondent, and display the assortments, for resale to the public, as manufactured, packed, and suggested by the respondent, using the display cards furnished (R. 17, 18); that all sales made by the respondent, whether to jobbers, wholesalers, or retailers, are absolute sales; that the assortments are assembled and packed in such manner that they can be displayed by the retailer for sale and distribution to the public as suggested by the display card enclosed in each package, without alteration or rearrangement, and that unless the retailer unwraps, unpacks, disassembles, or rearranges the packages or assortments, they cannot be resold to the public except as a lottery or gaming device; and that the respondent not only has knowledge of the fact that the retailer sells these candy assortments by lot or chance, but packs and assembles the candy

with this purpose in view (R. 18). So far as the "Chocolate Penny Men" are concerned it is impossible to eliminate the gaming feature (the penny) inserted in four of the pieces in the assortment except by destruction of the pieces of candy (R. 14); and it is true also that respondent does more than pack and assemble the candy with knowledge of its disposition by lot or chance, for it is the respondent who originates and conceives the gaming device and prints the display cards (explaining the method of sale) which accompany each assortment (R. 14, 15, 16).

There is a finding also that the sale and distribution of respondent's candy by retailers as described is a sale by lot or chance and constitutes a lottery or gaming device; that many competitors regard respondent's method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States; that the effect on competitors selling "Straight Goods" is injurious and results in a diversion of trade from such competitors to respondent and others following similar practices, and the forcing of competitors to sell "Break and Take" goods in order to successfully compete with respondent and others employing the same methods, thereby acting as a restraint upon the freedom

of fair and legitimate competition in the candy industry (R. 18–19, 22); that the principal demand for the "Break and Take" candy comes from small retailers, who are often located near schools, and most of this candy is sold to children, who, because of the lottery or gaming feature connected with it, purchase it in preference to the "Straight Goods" candy when the two types are displayed side by side; that in many instances children purchase a piece of candy, break it open, and, if the center is not of a prize-winning color, throw it away and purchase other pieces until a prize is obtained or their money gone; and that the sale of "Break and Take" candy teaches and encourages gambling among children (R. 20).

There are in the United States a large number of candy manufacturers producing and selling "Break and Take" candy of a character similar to that produced by respondent, and all of this "Break and Take" candy is in direct competition with "Straight Goods" of the same price level (R. 20–21). The pieces of candy in the "Break and Take" packages of all manufacturers of this type of candy are either smaller in size or inferior in quality to corresponding pieces of "Straight Goods"; and these differences in quantity or quality are necessary in order to compensate for the value of the prizes or premiums distributed with the "Break and Take" goods (R. 21–22). Children purchase the "Break and Take" candy

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in preference to the "Straight Goods" because of the chance of winning a prize or premium (R. 22).

Respondent itself sold "Break and Take" candy prior to 1925. In that year it discontinued the sale of this type of candy and manufactured and sold "Straight Goods" for a time, but during this period its business showed a decided decrease in volume and profits. Thereafter, it resumed the sale of "Break and Take" candies, with the result that its sales have shown a continuously increased volume, and at the time the findings of the Commission were made 60 percent of the respondent's sales consisted of candy with a lottery or gaming feature. During the time respondent was not manufacturing and selling "Break and Take" candy, many of its competitors were doing so, and, in order to meet this competition, respondent considered it necessary to resume the manufacture and sale of "Break and Take" goods (R. 22–23). Respondent's entire manufacturing business for the year ending June 30, 1930, amounted to approximately $391,000 (R. 23).

The Commission found that the sale and distribution of candy by lot or chance is against the public policy of many of the States, and that some of these States have laws making lotteries and gaming devices penal offences (R. 23).

Upon the basis of its findings of fact the Commission concluded that the respondent's practices

were to the prejudice of its competitors and the public and constituted unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act (R. 24).

The order entered by the Commission required the respondent to cease and desist from selling and distributing to jobbers and wholesale dealers, for resale to retailers, packages or assortments of candy so packed and assembled that they can be used as a lottery, gaming device, or gift enterprise, in the resale of the candy to the public, and from furnishing in such assortments of candy, or separately, display cards which explain to the purchaser the lottery method of sale (R. 25–28).

The court below, one judge dissenting (R. 376), without disturbing the Commission's findings or holding that they were not supported by adequate evidence,[1] set aside the order on the ground that the Commission was without jurisdiction to enter it. The basis of its decision was: (1) that respondent had done nothing against public policy because its acts could not, of themeslves, tend to hinder competition or create monopoly, since its competitors "were free to use the same sales methods * * * and to obtain their share of the penny candy trade on an equal footing"; (2) that there was nothing in the case to show deception, fraud, or bad faith affecting competitors or the ultimate consumer.

[1] We, therefore, do not deem it necessary for present purposes to recite the evidence before the Commission.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent's practices do not tend to hinder competition.

(2) In holding that respondent's competitors were not injured because they could use the same sales methods.

(3) In holding that a sales plan in which the traders employing it do not compete on the basis of quality, quantity or price, but which introduces a lottery or gaming device to enable them to sell their goods, is not an unfair method of competition.

(4) In holding that a sales plan which induces a consumer to purchase an article smaller in size or inferior in quality to similar competing articles because of a chance to win a prize or premium, without advising the purchaser that the article is smaller in size or inferior in quality, is not a deceptive plan, and therefore an unfair method of competition.

(5) In holding that a sales plan which provides retailers with a means by which they violate the lottery laws of their respective States, and which forces competitors, in order to compete on even terms, to become originators of devices and participants in plans whereby State laws are violated, is not an unfair method of competition.

(6) In disregarding that portion of Section 5 of the Federal Trade Commission Act which provides that "The findings of the Commission as to the facts, if supported by testimony, shall be con-

clusive", when the findings in this case specifically show that the sales plan of respondent involved in this proceeding is injurious to competitors and the purchasing public, and such findings are amply supported by adequate testimony.

(7) In holding that, upon the findings of fact and conclusion of the Commission, the cease and desist order entered was not within the jurisdiction of the Federal Trade Commission.

(8) In setting asfde the cease and desist order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

I

THE CASE PRESENTS A QUESTION OF PUBLIC IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

(a) The holding of the Circuit Court of Appeals means that competition in trade need no longer be based on the quantity, quality, or price of the article sold, but upon the manufacturing and packing of the merchandise in such manner that it is not only merchandise but also a gambling device, which, when used in retail sales, appears to be illegal under the laws of all of the States. (See Appendix B, *infra,* p. 27.) This device not only results in the merchandising of something other than articles of commerce—in this case a chance—but injures the business of those manufacturers who for ethical as well as legal reasons refuse to be a party to similar plans, thereby hindering competition.

(b) This case involves one of the largest industries in this country, its total sales amounting to hundreds of millions of dollars. In the years 1929 and 1931, the total volume of business of the confectionery industry in the United States (including confectionery made as secondary products in other industries) was as follows: [2]

1929 (sales by manufacturers)	$368,628,691
1931 (production by manufacturers)	264,144,549

An estimate of total sales of candy for the years 1930 and 1931, is as follows: [3]

1930	$318,558,306
1931	269,450,859

There are two general methods of selling candy by gambling schemes: (1) the various types of "Break and Take" packages similar to those used by respondent herein; and (2) punch boards, fortune boards, push cards, etc., which are not only used to sell candy, but also many other kinds of merchandise. While these last named devices are not directly involved in this case, their use is spreading rapidly, and the right of manufacturers to sell merchandise in that fashion will undoubtedly be affected, if not controlled, by the decision in this case. The Commission has issued complaints against a number of respondents using them to sell all kinds of merchandise, including candy, and has

[2] Census of Manufacturers, 1931, Bureau of the Census, Department of Commerce, "Confectionery."

[3] Confectionery Distribution in the United States, 1930–1931, Department of Commerce, Bureau of Foreign and Domestic Commerce, Foodstuffs Division.

issued an order to cease and desist against one respondent.

The "Break and Take" schemes are used in selling what is known in the candy industry as "penny goods," which consist of candy sold generally for 1, 2, and 3 cents per piece, and "bars" selling for 5 and 10 cents each. To a lesser extent, boxed candy is sold by this means, usually in the form of prizes or premiums. The figures of the Bureau of Foreign and Domestic Commerce show that in 1930 and 1931, the sales of penny goods and bars of various kinds amounted to $104,604,251 and $87,642,958, respectively. While all of this candy is not sold by means of lottery packages, it is probable that at least 50 percent is, which would amount to a total of $52,332,125 in 1930, and $43,821,478 in 1931, of "penny goods" and "bars" sold by the methods complained of by the Commission.

Cases coming before the Commission, in which complaints have been issued, indicate the widespread use of lottery schemes and punch boards by candy manufacturers. It should be noted also that there are many candy manufacturers who are not members of the national association of the candy manufacturers and undoubtedly some of them use these methods of sale. The cases before the Commission show that a large volume of boxed or packaged candy is sold by means of punch boards and

similar devices. According to the figures of the Bureau of Foreign and Domestic Commerce the total sales of boxed candy were, in 1930, $57,310,411, and in 1931, $51,240,677.

The figures above set forth indicate the importance of this industry and the extent to which gambling schemes and devices of various kinds have been used in it to sell its products.

(c) The practice of selling merchandise, not upon its merits but as part of a gaming scheme, has become increasingly prevalent in recent years. In findings of facts made by the Commission in Docket No. 1862, A. S. Douglis & Company et al., in which an order to cease and desist has been entered but not yet presented to the courts for review, the Commission found that through the use of punch boards and similar devices respondents have sold merchandise consisting of jewelry, knives, candy, tableware, clocks, dishes, traveling bags, blankets, fountain pens, automatic pencils, flashlights, cigarette cases, pipes, sporting goods, fishing tackle, cameras, doll babies and various other small articles.

Many industries have taken action against the introduction and spread of this method in their lines by means of resolutions adopted in conventions, or in codes of ethics governing fair practices in the particular industry. A reference to a few of the industries will be made here, and more detailed statements regarding the action taken may be

found in Appendix C, *infra*, p. 29. Thus, in 1923, the National Confectioners' Association adopted resolutions against the practice, as did the New England Confectioners' Association. In 1924 the New England Association again adopted resolutions condemning the method, and the Association of Manufacturers of Confectionery and Chocolate of the State of New York took active steps to suppress the method of sale in its territory. The Report of the National Industrial Conference Board, 1929, on the Public Regulation of Competitive Practices, approved the action of the Commission in holding such sales methods to be unfair methods of competition. The Grocery Industry in 1928 (with net sales for 1929 aggregating $10,837,421,585) adopted a resolution in its Trade Practice Conference before the Commission condemning lottery sales schemes as unfair trade practices. The Trade Practice Conference for the Petroleum and Petroleum Products Industry (with products for 1929 estimated to be of the value of $2,639,700,000), held by the Commission in 1929, adopted a resolution condemning lottery schemes and games of chance in connection with sales, as did the Association of Ice Cream Supply Men, in 1920, and the National Association of Ice Cream Manufacturers in 1922. The International Association of Milk Dealers in 1923 declared lottery schemes to be unfair. And in the code of ethics adopted by the

National Confectioners' Association in 1923, punch boards and other lottery devices were held to be injurious and detrimental to the best interests of the industry.

(d) The present case was chosen by the Commission as a test case, the final decision of which will govern the disposition of other pending cases. The Commission has issued 64 complaints against other candy manufacturers, charging them with using similar methods of sale. The testimony shows that 15% of the membership of the National Candy Manufacturers' Association are not employing lottery or gaming devices as an aid in selling their candy (R. 324). There are also many manufacturers, not members of the Association, who do not use such a sales plan. These two groups represent a substantial percentage of the candy manufacturers of the country, and are entitled to protection against unfair methods. While it is true that practices similar to respondent's are becoming increasingly prevalent, and are encouraging violation of State laws among manufacturers and retailers, there is, however, a strong indication in the evidence that a substantial portion of the candy manufacturers employing lottery or gaming devices would prefer to abandon the practice were it not for the fact that they fear they would lose business to competitors not abandoning it.

II

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

(a) *That competitors are free to follow the same illegal sales method is no defense*

The holding of the court below that "other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner" is directly contrary to the decision in *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493, in which this Court said:

> That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Co. in the public interest.

The testimony in the instant case shows that 15 percent of the 450 members of the National Candy Manufacturers' Association do not employ sales methods such as used by respondent (R. 324), and there are many other manufacturers, not members of the Association, who do not use them. All of these manufacturers are competitors of respondent, and they are entitled to protection against the sales method resorted to by the respondent and others following the same plan. In order to compete successfully with respondent, these manufac-

turers are forced to manufacture and sell in interstate commerce merchandise which is not only merchandise, but a gambling device as well, which, when used in retail sales, violates State laws.

The decision of the lower court is also in conflict with that portion of the decision in the *Winsted Hosiery case* (*supra*) holding that (pp. 493–494):

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived.

(*b*) ***Methods of competition which injuriously affect or tend to affect the business of competitors are against public policy***

The decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court to this effect in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 648, 649, 651.

Dealers selling only "Straight Goods" cannot successfully compete with respondent and others selling "Break and Take" candy.—It is not neces-

sary in the instant case to rely upon a "dangerous *tendency* unduly to hinder competition or create monopoly" (*Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, *supra*), because the undisputed facts already recited demonstrate that the business of many "Straight Goods" manufacturers have been seriously injured by the sales plan followed by respondent. There are findings to this effect (R. 19, 22–23), and the court below, in its opinion, also recognizes this fact.

From the testimony it appears that when penny and nickel "chance candies" are on sale with "Straight Goods," children almost invariably select those involving a gamble (R. 68, 91, 94, 101, 103, 110, 116, 126, 130, 131, 169, 179, 222, 244, 278, 307, 327). The result is that "Straight Goods" rarely sell over the same counter with "chance candies." So established is this observation that many keepers of small stores have ceased to buy and display "Straight Goods" for the penny trade. They sell only "chance candies." In consequence, more than half of the manufacturers of penny candies in this country have gone into the "trick trade" (R. 324). Many traveling salesmen for "Straight Goods" houses have complained of their inability to sell their wares in competition with "chance candies." Others have refused to continue the effort and have threatened to seek employment elsewhere (R. 164, 206, 219–220, 235–236, 262–264, 279–280). One "Straight Goods" concern at-

tributes to competition by "chance candies" a drop in its business of 50% in the sale of penny goods and 20% in the sale of nickel goods (R. 277). A concern manufacturing only "Straight Goods" lost some of its strong customers because, wanting "chance candies" as well, they preferred to buy both kinds at one place (R. 283). Still another manufacturer who handled "Straight Goods" alone saw his business reduced 85% by reason of this new type of competition (R. 305–306). Two manufacturers, "competing * * * for that child's penny," declared that their refusal thus far to put a gamble in their candy packages has placed them at a distinct disadvantage (R, 310–311, 315). Another concern was "forced" to meet the respondent's competition by putting out trick candy packages. It then discontinued the practice, but later was forced to resume it, mainly because "a howl was set up by our salesmen that they could not get the business." Again it stopped the practice and again it was forced to resume it in order not only to regain business in "chance candies," but to retain its business in "Straight Goods," as customers who still deal in candies of both kinds want to buy all their requirements from one manufacturer or jobber. When it stopped selling "chance candies" its business fell off from 40 to 50%. When it started again, its business increased at once (R. 126–127, 133–134, 144, 174). Officers and salesmen of other companies testified to similar experiences, which apparently extend throughout the trade (R.

234, 256, 261, 269, 313, 328). These matters are all set forth in the dissenting opinion. A list of competitors who testified to the injurious effect upon their business of the method of sale used by respondent, with citations to the portions of the record where their testimony will be found appears in Appendix D, p. 39, *infra*.

III

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

The decision of the court below is in conflict with the following decisions of various Circuit Courts of Appeals which hold that, in cases prosecuted under Section 5 of the Federal Trade Commission Act, it is no defense to prove that respondent's competitors have practiced the same illegal sales method: Second Circuit, *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744, 752; *Butterick Co.* v. *Federal Trade Commission,* 4 F. (2d) 910, 912; Eighth Circuit, *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 686; Ninth Circuit, *Hills Bros.* v. *Federal Trade Commission,* 9 F. (2d) 481, 485. In this connection, see also the decision in *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375, 379.

It is obvious that the decision of the court below that a cease and desist order is invalid which is directed against an unfair method of competition

that is contrary to public policy and is against good morals, and which excludes or strongly tends to exclude from the market all competitors who do not use the same method, upon the ground that respondent's competitors may protect themselves by adopting the same practices, seriously impairs the efficiency of Section 5 of the Federal Trade Commission Act.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

ROBERT E. HEALY,
Chief Counsel,
Federal Trade Commission.

JUNE 1933.

APPENDIX A

Relevant Portions of Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719)

That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. *The findings of the commission as to the facts, if supported by testimony, shall be conclusive.* If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such peti-

tion shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and *the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.*

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive. * * * (Italics ours.)

APPENDIX B

State Statutes Prohibiting Lotteries, Gift Enterprises, Etc.

Alabama: Sec. 4247, Code of 1928; Sec. 4248, Code of 1928.

Arizona: Sec. 4676, Revised Code of 1928.

Arkansas: Sec. 2667, Statutes of Arkansas (1921).

California: Chapter IX, Secs. 319 and 320, Penal Code.

Colorado: Chapter LXI, Sec. 3759, Compiled Laws (1921).

Connecticut: Secs. 6334 & 6338, Gen. Statutes, Revision of 1930.

Delaware: Sec. 3566, Revised Code, 1915.

District of Col.: Secs. 151–152, 313–314–315, D.C. Code (1929).

Florida: Vol. 4, Sec. 7667, Comp. Gen. Laws, 1927.

Georgia: Secs. 397 & 398, Penal Code (1926).

Idaho: Chap. 24, Secs. 17–2401 & 17–2403, Idaho Code Annotated, 1932.

Illinois: Chap. 38, Sec. 401, Criminal Code, 1931.

Indiana: Sec. 2680, Indiana Statutes, Revision of 1926.

Iowa: Chap. 593, Sec. 13218, Code of Iowa, 1931.

Kansas: Secs. 21–1504 & 21–1506, Revised Statutes, 1923.

Kentucky: Chap. 82, Sec. 2573, Kentucky Statutes, 1930.

Louisiana: Act 169 of 1894, p. 207, Sec. 1, Statutes of Louisiana, 1930, also Criminal Statutes, Annotated, 1932.

Maine: Chap. 136, Sec. 18, Rev. Statutes, 1930.

Maryland: Art. 27, Secs. 336–337–349, Ann. Code, 1924.

Massachusetts: Chap. 271, Sec. 7, Gen. Laws, 1932.

Michigan: Chap. 277, Secs. 16, 613, Comp. Laws, 1929.

Minnesota: Sec. 10209, Minn. Statutes, 1927.

Mississippi: Chap. 20, Sec. 1038, Miss. Code, 1930.

Missouri: Sec. 4315 Rev. Statutes (1929).

Montana: Chap. 32, Secs. 11149, 11150, Penal Code, 1921.

Nebraska: Chap. 28, Art. 9, Sec. 28–962, Comp. Stat. (1929).

Nevada: Sec. 10176, Compiled Laws, 1929.

New Hampshire: Chap. 384, Secs. 1 & 5.

New Jersey: Vol. 2, p. 1764, Comp. Statutes.

New Mexico: Chap. 1760, Sec. 310, N.M. Statutes.

New York: Secs. 1370–1371, Consolidated Laws.

North Carolina: Sec. 4428, N.C. Code (1927).

North Dakota: Arts. 9660–9661, Penal Code.

Ohio: Sec. 13064, Code of Ohio.

Oklahoma: Secs. 1893–1894, Comp. Statutes.

Oregon: Sec. 2116, Oregon Laws.

Pennsylvania: Secs. 7932–7933, Pa. Statutes.

Rhode Island: Chap. 401, Sec. 1, Gen. Laws.

South Carolina: Chap. XI, Sec. 199, Code of Laws.

South Dakota: Secs. 3894–3895, Comp. Laws (1929).

Tennessee: Sec. 6834, Ann. Code.
Texas: Art. 654, Penal Code.
Utah: Secs. 4253–4254, Penal Code.
Vermont: Chap. 310, Secs. 7078, 7079, Gen. Laws.
Virginia: Sec. 4693, Va. Code.
Washington: Sec. 2464, Comp. Stat.
West Virginia: Chap. 151, Art. II, W.Va. Code (1923).
Wisconsin: Sec. 34801, Wisc. Statutes.
Wyoming: Art. 7265, Comp. Statutes.

APPENDIX C

MEMORANDUM SHOWING OPPOSITION IN VARIOUS INDUSTRIES TO THE USE OF THE LOTTERY MERCHANDISING SYSTEM

Resolutions of Associations.—The National Confectioners' Association adopted resolutions condemning the sale of candy by gambling devices at a convention held in Atlantic City on May 25, 1923. The Commission does not have a copy of these resolutions, but a statement of their contents is contained in the resolutions of the New England Manufacturing Confectioners' Association, set forth below.

The New England Manufacturing Confectioners' Association, with offices at 40 Court Street, Boston, Mass., adopted the following resolutions at a meeting held on May 8, 1923:

> The matter of packing candy to be used for gambling, especially for children, was discussed very thoroughly. As a result the following resolutions were approved and the Secretary was instructed to forward the same to the Resolutions Committee of the National Association to be considered at the next convention:
>
> WHEREAS manufacturing confectioners in various sections of the country are making and selling candy and chewing gum packed and prepared in such form as to be available for and intended to be used as instruments of gaming, and

WHEREAS a large proportion of the candy and chewing gum so packed and prepared is sold by retailers to children who are thereby encouraged and induced to develop the gambling spirit: Therefore be it

Resolved, That the National Confectioners' Association in convention assembled condemns the manufacture and sale of candy and chewing gum so packed and prepared as to be manifestly designed for gambling purposes; and be it further

Resolved, That it is the sense of this Association that such preparation and sale is unethical, unfair in practice, and tends to lower the moral tone of the industry; and be it further

Resolved, That the Executive Committee direct the Secretary to communicate with such members of this Association as are selling such packages, requesting them to discontinue the practice, and if such request is not complied with to report their names to the Executive Committee for such action as may be deemed to be for the best interests of the industry and the welfare of the Association.

At another meeting held the next year, April 24, 1924, the following resolutions were adopted:

Resolved, That the New England Manufacturing Confectioners' Association goes on record as being opposed to the practice of making and selling candy and chewing gum put up in such form that the element of chance is the controlling factor in the sale of the merchandise. That this Association is in hearty accord with and fully appreciates the service rendered by the Association of Manufacturers of Confectionery and Choco-

late of the State of New York in its effort to suppress this growing evil in the confectionery industry.

The above resolutions were to be sent to the President of the New York State Association, and the following resolutions to be sent to the Resolutions Committee of the National Confectioners' Association:

WHEREAS The National Confectioners' Association at its annual convention in Atlantic City, May 25, 1923, approved and adopted a preamble and resolutions setting forth that the sale of candy and chewing gum packed and prepared in such form as to be available for and intended to be used as instruments of gambling was unethical, unfair in practice, and tended to lower the moral tone of the industry; and

WHEREAS The Association has adopted and published a Code of Business Ethics for the Candy Industry condemning the sale of confectionery wherein the element of chance is the controlling factor in its sale to consumers; and

WHEREAS, Manufacturing confectioners in various sections of the country are still engaged in the business and practice of making and selling candy packed and prepared in the manner herein referred to, therefore be it

Resolved, That this Association reaffirms its attitude as indicated by the adoption of the resolutions relating to this subject one year ago, and be it further

Resolved, That the Executive Committee be requested to formulate a plan for securing Federal legislation to put an end to the practices herein mentioned, and be it further

Resolved, That it is the sense of this Association that a campaign of publicity by means of the newspapers throughout the

> United States concerning the wide-spread evil of making and selling candy and chewing gum packed in such form as to be intended for gaming, be at once undertaken and that the Secretary be empowered and instructed to institute the same.

The above resolutions refer to activities on the part of the Association of Manufacturers of Confectionery and Chocolate of the State of New York to stop gambling schemes in the candy industry. It is apparent from these several resolutions of different confectioners' associations that the candy industry realizes the serious effect the sale of candy by lottery and gambling schemes is having, and that the industry is doing all in its power to stop it.

The National Association at its meeting in May 1923, at which resolutions were adopted, also adopted a Code of Ethics for the industry which contained a condemnation of the sale of candy by chance schemes.

Report of the National Industrial Conference Board, 1929, on the Public Regulation of Competitive Practices

This work discusses a number of sales methods, including "Lotteries." With reference thereto, it says:

> It is regarded as contrary to sound morality that men should be encouraged to seek "something for nothing"—or for a trifle. At the same time it is recognized that there are economic objections to a scheme which extracts small contributions from many, without compensation, for the benefit of the chance recipient of an unearned prize * * *.
>
> The policy adopted by the Commission [Federal Trade Commission] in these cases comports with established public policy.

> There was no finding that the prizes were misrepresented, that their drawing was dishonestly conducted, or that the quality of the coffee sold by the lottery method was inferior. * * * In other words, *an honest lottery as a method of promoting sales was held to constitute an unfair method of competition. This appears to be sound doctrine. If it is unfair competition to tempt buyers by misrepresentations of the quality of goods, it may be regarded as likewise unfair to tempt them to buy goods not upon their merits, but upon the chance of securing something for nothing.* (Italics ours.) (Pp. 149–151.)

Trade Practice Conference for the Grocery Industry, held under the auspices of the Federal Trade Commission on October 24, 1928

Briefly, a Trade Practice Conference is a *voluntary* proceeding duly authorized by the Federal Trade Commission whereby an industry may assemble for the purpose of discussing unfair methods of competition with a view to eliminating such methods.

At this conference involving the Grocery Industry over 700 persons were in attendance. Eighty-five percent of the brokers, 85% of the wholesale grocers, and 80% of the retail grocers were represented through associations or in person. In addition, numerous specialty manufacturers were represented.

One of the resolutions *adopted by the Conference,* and approved by the Commission, was Rule 3 of Group I, viz:

> The offering or giving of prizes, premiums, or gifts in connection with the sale of grocery products, or as an inducement

thereto, *by any scheme which involves lottery, misrepresentation or fraud, is an unfair trade practice.* (Italics ours.)

The significance of the position taken by the representatives of this industry will readily be apparent by reference to statistics published by the Bureau of the Census of the United States Department of Commerce. Thus, the publication "*Retail* Distribution—Summary for the United States—Fifteenth Census of the United States, 1930", at page 45, gives a grand total for net sales (1929), for the entire food group, of $10,837,421,585. While this figure includes confectionery stores, it does not include general stores which sell groceries with dry goods, apparel, and general merchandise, net sales for which is $2,570,744,006. The above figures cover the *retail* distribution. The publication "*Wholesale* Distribution—Summary for the United States—Fifteenth Census of the United States, 1930", at page 69, lists net *wholesale* sales for groceries and food specialties at $9,537,322,597.

The position taken by the Grocery Industry at the Trade Practice Conference (*supra*) is in line with previous declarations of both the retail and wholesale grocers association, which follow:

Extract from Declaration of Principles, adopted June 1923, by the National Association of Retail Grocers

Under the caption "Trading Stamps and Gift Schemes Deceptive", appears the following:

> We believe gift schemes, trading stamps and coupons of all kinds are detrimental to good merchandising and deceptive to the public.

Excerpt from "The National's Creed"—National Wholesale Grocers Association

> *Seventh.*—To have business conducted upon lawful and proper lines and to correct evils, including "schemes", "deals", *"Lotteries"*, premiums", and the subsidizing of jobbers' salesmen. (Italics ours.)

Trade Practice Conference for the Petroleum and Petroleum Products Industry, held under the auspices of the Federal Trade Commission, February 11, 1929

At this conference, between 95% and 97% of the refining industry of the United States was present or represented.

One of the resolutions adopted by this conference was Rule 5 of Group I, providing as follows:

> Lotteries, prizes, wheels of fortune, and/or other games of chance, shall not be used in connection with the sales of gasoline or motor oils.

This is also one of the largest industries. The "Commerce Yearbook, 1932", at page 49, lists the value of products for petroleum refining for 1929 at $2,639,700,000.

"The Fair Practices Code" of the Association of Ice Cream Supply Men, adopted at Atlantic City, September 20, 1920

This is another instance which shows that as early as 1920 lottery methods in the sale of goods had been condemned. A pertinent excerpt follows:

> The Code of the Association declares the following practices by its member firms unfair, and proof of their commission grounds for expulsion and for full publicity:

SECTION I

UNFAIR PRACTICES OF SELLER AS AGAINST BUYER

* * * * *

9. "Lottery" premiums—i.e., giving or offering premiums of unequal value, *the receipt of any particular premium to be determined by lot or chance.* (Italics ours.)

The "Census of Manufacturers, 1931—Summary by Industries, December 30, 1932", at page 9, lists the value of ice cream products at $267,507,751.

Extract from Code of Ethics of National Association of Ice Cream Manufacturers, adopted October 18, 1922

Under the caption "Unfair Practices of Seller against Buyer" appears the following:

10. Lottery premiums given or offering premiums of unequal value, *the receipt of any particular premium to be determined by lot or chance.* (Italics ours.)

Code of Ethics of the International Association of Milk Dealers, adopted at Sixteenth Annual Convention, held at Syracuse, N.Y., October 9, 1923

This Code lists certain trade practices which "are to be known and declared unfair." Among them are a number of practices between dealer and customer, No. 6 of which is:

(6) Lottery Premiums: Giving or offering premiums for consideration of merchandise or money, *the premiums to be determined by lottery.* (Italics ours.)

From "*Retail* Distribution—Summary for the United States—Fifteenth Census of the United States—1930", at page 45, it appears that the net

retail sales for 1929 of milk dealers amounted to $560,995,747. From the corresponding publication showing "*Wholesale* Distribution", at page 72, the net sales of dairy products is given as $601,424,379.

Extract from the Code of Ethics for the Candy Industry, adopted by the National Confectioners' Association of the United States in May 1923

Under the heading: "Practices Detrimental to the Reputation of the Industry", appears the following:

> Punch Boards, Raffle Cards, *and similar devices,* and *Candy sold in such manner as to be obviously intended for games of chance wherein the element of chance is the controlling factor in the sale of the Candy to the consumers,* which encourage and develop the gambling habit in children, are injurious to their morals and are detrimental to the best interests of the Candy Industry and are a menace to the future development of the Industry.
>
> We condemn the sale of such packages and ask the earnest, active cooperation of our members and all others engaged in the Candy Industry in bringing about the elimination of this evil from our Industry.
>
> The sale of such packages shall be considered to be prejudicial to the character and best interests of the National Confectioners' Association and the Candy Industry at Large, for which a member may be suspended or expelled from membership in the National Confectioners' Association. (Italics ours.)

Doubtless the above examples could be multiplied upon further investigation. It should, of course,

be remembered that the practice of disposing of commodities by lottery methods is more readily applicable to some lines of industry than others, i.e., to those involving the sale of goods in comparatively small packages or amounts, rather than bulky products. The candy and grocery trades are good examples.

APPENDIX D

COMPETITORS AND REPRESENTATIVES OF COMPETITORS WHO TESTIFIED TO THE UNFAIR AND INJURIOUS EFFECT UPON THEIR BUSINESS OF THE METHOD OF SALE USED BY RESPONDENT, AND PAGE REFERENCES TO THE RECORD

	Page
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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 194

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 371) is reported in 63 F. (2d) 81; the dissenting opinion of Judge Woolley (R. 376) begins at p. 83.

JURISDICTION

The decree of the Circuit Court of Appeals setting aside the order of the Commission was entered January 25, 1933. (R. 383.) Petition for certiorari was filed June 21, 1933, and was granted October 9, 1933. (R. 386.)

Jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S.C., Title 15, Sec. 45), and Section 240(a)

of the Judicial Code as amended by the Act of February 13, 1925. *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212.

QUESTIONS PRESENTED

The principal question presented is whether the method of competition involved in the sale of assortments of candy so arranged that they may be resold to children in a manner involving lot or chance is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act, where it appears that the sale of such assortments diverts trade from competitors who do not use lottery devices.

The questions (1) whether the methods complained of are methods of competition, and (2) whether the Commission's action is in the public interest, will also be considered.

STATUTE INVOLVED

The relevant portion of Section 5 of the Federal Trade Commission Act is set forth in the Appendix, pp. 43–46, *infra*.

STATEMENT

As indicated in our petition for a writ of certiorari, this is in the nature of a test case [1] intended to determine whether the Federal Trade Commission may, upon proper facts, find that the use of lottery devices in connection with the sale of goods in interstate commerce is an unfair method of competition within the

[1] The Commission has issued 64 complaints against other candy manufacturers, charging them with using similar methods of sale.

meaning of Section 5 of the Federal Trade Commission Act. The particular facts here involved concern the sale by respondent, to wholesalers or retailers, of so-called penny candies so arranged in packages that the ultimate consumer, usually a child, if he makes a fortunate selection, wins a premium or prize. The evidence shows that the use of lottery devices in connection with sales of candy diverts trade from those competitors who decline to sell lottery packages because they are intended to appeal to the gambling instincts of children, or because the use of lottery devices is generally prohibited by law in this country, or because the use of such devices is regarded as injurious to the candy business. The Commission decided that the use of lottery devices by respondent in aid of the sale of its penny candies is an unfair method of competition, and it ordered the respondent to cease and desist from employing such devices.

The Commission instituted its proceedings by the issuance of a complaint (R. 2–7), to which respondent answered (R. 8–9). An examiner was appointed to take testimony (R. 10). Upon the record made before the examiner, the Commission made its findings of fact and conclusion (R. 12–24) which may be briefly summarized as follows:

Respondent, a corporation with its principal place of business in Lancaster, Pa., has been engaged for more than five years [2] in the manufacture of candy

[2] The testimony indicates that it has been in the business of manufacturing candy since 1918. (R. 31.)

and the sale of candy in interstate commerce to wholesalers, jobbers, and retailers, in active competition with other concerns similarly engaged. (Par. One, R. 13.) The entire manufacturing business of respondent for the year ending June 30, 1930, amounted to approximately $391,000; in addition to its manufacturing business, respondent conducts a jobbing department through which it distributes to retailers the products of other candy manufacturers. (Par. Fifteen, R. 23.) Its business to the extent of 60% consists of sales of "break and take" assortments, i.e., assortments with lottery features, as distinguished from "straight goods", or candy sold without gaming, prize or lottery features. (Pars. Six, Fourteen, R. 17, 23.) The following assortments of "break and take" penny candy are being sold by respondent:

(1) "*Chocolate Penny Men*"—120 pieces of chocolate covered cream candy, each moulded into the shape of a man, are packed in a box. In 4 of the pieces a penny is concealed, so that the purchaser who happens to select one of these 4 pieces receives his penny back and obtains the piece of candy free of charge. A display card accompanying the package (Commission's Exhibit 2, R. 351) displays a picture of a boy and bears the label, "Watch this Boy, He Has Money in His Pockets."[3] (Par. Two, R. 13–14.)

[3] The ultimate purchaser has no means of determining how many of the pieces contain pennies, and he does not know, therefore, what his chances are of receiving his penny back.

(2) *"1, 2, 3 Big Chief 60s"*—60 peanut bars, uniform in size and quality, are packed in a box. An accompanying display card (Commission's Exhibit 5, R. 357) indicates that 10 bars sell at one cent each, 10 at 2 cents each, and 40 at 3 cents each.[4] Each peanut bar is contained in a nontransparent wrapper in which also is concealed a ticket indicating the retail price of that bar. Thus the price of a bar cannot be ascertained until after purchase, when the wrapper is removed. (Par. Three, R. 14–15.)

(3) *"School Days 200"*—200 small chocolate cream candies are packed in a box. The box contains in addition 20 chocolate-covered pieces of candy, 8 of which are moulded into the shape of a boy, 8 into the shape of a girl, and 4 are double pieces called "twins." The box also contains a "School Companion", i.e., a container with school supplies, such as pen, pencils, etc., 16[5] of the small chocolate cream candies have pink centers, 4 have chocolate centers, and the remaining 180 have white centers. A display card accompanying this assortment (Commission's Exhibit 9, R. 365) bears the legend: "One piece of cream with white center, one cent; one piece of cream with pink center and school boy or girl, one cent; one piece of cream with chocolate center and set of twins,

[4] Formerly this assortment contained three bars which could be obtained free, five bars at one cent each, five bars at three cents each, five bars at four cents each, and twenty-two bars at five cents each. (Par. Four, R. 15–16.)

[5] In the opinion of the court below this number is inadvertently given as "8." (R. 372.)

one cent; last piece of cream and school companion, one cent."[6] (Par. Five, R. 16–17.)

The purchaser never knows prior to purchase whether he will win any premium or prize. The Commission found in each case, therefore, that what the purchaser receives, or the price he will pay, depends upon lot or chance. (R. 14, 15, 17.)

Respondent has knowledge that its "break and take" candy will be resold to the purchasing public by retail dealers by lot or chance, and it is for this reason that it packs and assembles the candy in the manner described. (Par. Eight, R. 18.)

There are in the United States a large number of manufacturers of candy who manufacture and sell "break and take" candy of the same general character as that produced by respondent, and their product is sold in direct competition with "straight" penny goods and five cent bars. The pieces of candy in the "break and take" packages are either smaller in size than the corresponding pieces of "straight goods" candy, or the quality of the candy in the "break and take" packages is poorer than that in the "straight goods" assortments. Respondent sells "straight goods" which is of the same quality as its "break and take" candy but the pieces are larger in size. This difference in size or quality is necessary in order to compensate for the value of the prizes or

[6] No indication is given to the ultimate purchaser of how many of the cream candies have white, how many have pink, and how many have chocolate centers, and he does not know, therefore, what his chances are of winning a prize piece.

premiums which are distributed with the "break and take" goods. The purchaser of a piece of candy from a "break and take" package does not receive the same value for his money that he would if he purchased a piece of candy from a "straight goods" package, unless he wins a premium or prize, in which case the value of what he receives is greatly in excess of the value of a "straight goods" piece of candy. (Pars. Eleven, Twelve, R. 20–22.)

There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages of candy, but who sell their "straight goods" candy in interstate commerce in competition with the "break and take" packages of respondent and other manufacturers of similar candy. The sale of "straight goods" is adversely affected by the sale of "break and take" candy, and manufacturers of the former type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sale of "straight goods" candy is principally due to the gambling and lottery features connected with the "break and take" candy. Children, who are the principal purchasers of penny candy, purchase the candy which offers a chance to win a prize or premium, irrespective of differences in size or in quality. (Par. Thirteen, R. 22.)

The principal demand in the trade for the "break and take" candy comes from the small retailers, whose stores are in many instances located near

schools and attract the trade of school children. Because of the lottery or gaming feature connected with the "break and take" package, and the possibility of winning a prize or premium, it has been observed that children purchase "break and take" candy in preference to "straight goods" when the two types of packages are displayed side by side. (Par. Ten, R. 20.)

Respondent manufactured and sold "break and take" packages of candy prior to 1925. In that year it discontinued the sale of this type of candy and sold only "straight goods" for a time, during which its business showed a decided decrease in volume and profits, and it resumed the sale of "break and take" packages. During the time that it did not manufacture "break and take" candy, many of its competitors were continuing to do so, and respondent considered it necessary to resume the manufacture of that candy in order to meet the competition of others, and to make a profit in its business. (Par. Fourteen, R. 22–23.)

The sale and distribution of "break and take" candy by the retailers is a sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. (Par. Nine, R. 18.) The sale and distribution of candy by lot or chance is against the public policy of many of the States of the United States and some of said States have laws making the use of lotteries and gaming devices penal offenses. (Par. Sixteen, R. 23.)

Paragraph Nine of the Commission's findings is in part as follows (R. 19):

> Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several states. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers finding that they can dispose of more candy by the "Break and Take" method, buy from respondent, and others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "Straight Goods" candy show a continued decrease. * * * The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the free-

> dom of fair and legitimate competition in the candy industry.

The Commission concluded that the acts and practices of respondent complained of, under the conditions and circumstances set forth in its findings of fact, "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce" in violation of Section 5 of the Federal Trade Commission Act. (R. 24.) The Commission accordingly issued its order to cease and desist against respondent. (R. 25–28.)

Upon respondent's petition to the court below to review the order of the Commission (R. 333–345), the court decided, after hearing, Judge Woolley dissenting, that the Commission's order should be set aside. (R. 371–376.) The following, taken from the opinion of the court (R. 375), indicates the grounds of its decision:

> The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. * * *
>
> The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer.

The court below did not question the sufficiency of the evidence to support the Commission's findings. We deem it desirable, however, to refer to a part of the testimony of an officer of respondent, and to summarize briefly the testimony in the record with respect to competitive conditions in the industry.

The treasurer and vice-president of respondent was called by the Commission. He testified that the respondent commenced to manufacture candy in 1918. (R. 31.) In the year preceding the taking of testimony, the company's manufacturing business totalled $391,000, of which 60% consisted of sales of "break and take" candy. (R. 63.) The percentage of its sales of "break and take" candy as compared with its "straight goods" had been increasing. (R. 62–63.)

Several years ago respondent ceased to manufacture "break and take" candy for a period of 6 or 8 months, as a result of a movement in the industry in that direction, the origin of which the witness could not recall. (R. 66, 67, 69.) There were manufacturers who "didn't look with favor on this type of merchandise." (R. 88.) Respondent was "very glad to go along and quit." (R. 85.) However, some manufacturers continued to sell "break and take" packages and new ones started to do so, and respondent "felt that it was necessary in our business to begin again, as long as the others hadn't stopped." (R. 67.)

In 1926, on account of "the activities of the National Confectioners' Association in stopping the sale of these particular packages," respondent severed its

membership in the Association. (R. 81, 85.) The basis of the Association's action was the objection made by those manufacturers who did not sell "break and take" candy, but the witness could not recall the grounds of that objection. (R. 86–87.) Respondent would have had no objection to discontinuing the manufacture of "break and take" candy if the efforts of the Association had been successful and all manufacturers had discontinued it. (R. 82.) The witness indicated that respondent would be willing to discontinue the "break and take" package now, if the whole industry did likewise. (R. 88.)

In addition to this officer of respondent, the Commission called 16 witnesses, 9 of whom were representatives of competitors [7] of respondent (R. 89, 120, 200, 228, 238, 258, 274, 303, 311), the remaining 7 being candy salesmen, jobbers, and retailers. Respondent called no witnesses. (R. 331, 332.) Of the 9 representatives of competitors all but one testified that they did not sell "break and take" candy (R. 90, 202, 231, 240, 265, 276, 304, 313). Each of them testified that his business was adversely affected by sales of such candy. (R. 94–95, 104, 205, 233, 241, 244, 256, 261, 269, 277, 284, 305–306, 313, 315, 323.) The president of a company that has been in

[7] These competitors were: Allen & Smith Co., Richmond, Va.; George Close Co., Cambridge, Mass.; Fair Play Caramels Corporation, Johnson City, N.Y.; Henry Heide, Inc., New York, N.Y.; Charles N. Miller Co., Boston, Mass.; National Licorice Co., Brooklyn, N.Y.; New England Confectionery Co., Cambridge, Mass.; Voneiff-Drayer Co., Baltimore, Md.; York Caramel Co., York, Pa. They are competitors because they sell penny candy in the same markets. (R. 231, 241, 265, 270, 320–321.)

the business for over 50 years testified that since the introduction of "break and take" candy his penny goods business has been cut down as much as 50% (R. 277.) Furthermore, because he does not sell lottery goods some of his former customers purchase their entire candy needs from competitors who do have such goods. (R. 277, 283.) Others testified to the same effect. (R. 133–134, 174.) A witness who has been treasurer and general manager of his company for 13 years testified that the effect of sales of "break and take" candy "has been a very serious one from the time that this type of package first came on the market." (R. 305.) "We found," he stated, "that as our salesmen attempted to sell our own penny manufactures they were constantly being crowded for this type of package which we refused to make. The result was that our sales were lowered in favor of the manufacturer who was putting out this type of package." (R. 306.) The matter was summed up by this witness thus (R. 310–311):

> we do not have an equal opportunity, because it is inborn in the child, the desire to gamble. The child is undoubtedly going to play at this game if the opportunity is offered. We are competing with other manufacturers for that child's penny that he has to spend. There is an element in this that we refuse to put into our package which is attractive to the child, and therefore we are at a distinct disadvantage.

The salesmen and brokers also testified to the adverse effect of lottery packages on sales of straight

goods. (R. 164–165, 173–174, 176, 219–220, 328–329.) It appeared in evidence that of 450 members of the National Confectioners Association,[8] 70, or 15%, did not sell lottery packages. (R. 324.)

It is apparent from the record that of the large number who manufacture lottery packages, some of them would prefer not to produce such packages, but find it necessary to do so in order to meet the competition of others who sell them. One competitor of respondent testified that in 1924, as a result of pressure brought to bear by the National Confectioners Association, his company ceased to manufacture such products, but after several months was compelled for competitive reasons to commence to make them again. (R. 126–127.) Further pressure by the Association once more resulted in the cessation of their manufacture in 1927, "and we just had a duplication of what we had in '24 and '25; so then we started up again." (R. 127, 154–155.) At a meeting of penny goods manufacturers, out of 45 persons present, 40 indicated that they were manufacturing lottery packages "in self-defense." (R. 323.) A candy jobber testified that in his opinion 90% of the jobbers would be glad "to see the 'break and take' business stopped." (R. 177.)

Those who decline to produce "break and take" packages refrain from doing so because of the illegality involved in the use of lottery devices (R. 202, 234, 242, 277, 310, 313, 318); also because it is deemed undesirable to encourage gambling by chil-

[8] The record does not indicate what portion of the entire industry is represented by this association.

dren (R. 90–91, 102–103, 231, 278, 307); and because of the resulting tendency to substitute competition in gambling devices for competition in the sale of candy. (R. 91, 183–184, 266, 306.) One witness who emphasized the illegal character of "break and take" products testified that in his opinion packages of that type are both unethical and illegal; that his company would not do anything that was illegal or unethical; and that he believed that packages of that type are contrary to the laws of numerous States and municipalities. (R. 242.) A witness, testifying as to the effect of such sales on children, stated that his products are sold almost entirely to children, and he did not think it wise to cultivate the gambling instinct in the younger children. (R. 307.) Other witnesses testified that sales of penny candies are made principally to children. (R. 126, 214.)

The testimony was unanimous that "break and take" candy is uniformly either smaller sized per piece, or of poorer quality, than straight goods. (R. 116–117, 128, 147, 150, 187, 206, 215.) Respondent's "break and take" candy is smaller in size than its straight goods. (R. 63, 65.) Testifying as to the effect on sales of the difference in value between "straight goods" and "break and take" candy, a witness stated (R. 244):

> I would say that the gambling instinct in children is even stronger than reason. Reason would prompt them to take the better value for every penny that they spend, but the gambling instinct prompts them to try to get something for nothing.

A retailer testified (R. 110):

> Some of them don't care anything about the prize. I have seen them take it. They like to win. I have seen children who had plenty of money, you know, who get the prize and hand it over to another child. They like the game. It is the game that is the thing they like. It is the same as a game of gambling. I don't know. Anything that is fascinating they like to gamble on it.

Several other witnesses testified to the effect that the gambling element involved lures the child into purchasing the "break and take" candy. (R. 91, 94–95, 116, 130, 131, 327.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent's practices do not tend to hinder competition.

(2) In holding that respondent's competitors were not injured because they could use the same sales methods.

(3) In holding that a sales plan in which the traders employing it do not compete on the basis of quality, quantity or price, but which introduces a lottery or gaming device to enable them to sell their goods, is not an unfair method of competition.

(4) In holding that a sales plan which induces a consumer to purchase an article smaller in size or inferior in quality to similar competing articles because of a chance to win a prize or premium, without advising the purchaser that the article is smaller in

size or inferior in quality, is not a deceptive plan, and therefore an unfair method of competition.

(5) In holding that a sales plan which provides retailers with a means by which they violate the lottery laws of their respective States, and which forces competitors, in order to compete on even terms, to become originators of devices and participants in plans whereby State laws are violated, is not an unfair method of competition.

(6) In holding that, upon the findings of fact and conclusion of the Commission, the cease and desist order entered was not within the jurisdiction of the Federal Trade Commission.

(7) In setting aside the cease and desist order of the Federal Trade Commission.

SUMMARY OF ARGUMENT

I. The method of competition involved in the sale by respondent of "break and take" candy is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act. The words "unfair methods of competition" are not to be limited to any particular class of competitive practices. It is apparent from the legislative history of Section 5 that they were selected by Congress for the express purpose of providing a broad, flexible, all-inclusive standard. The decision of this Court in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, was not intended to hold to the contrary; this is shown by the decision in *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, where this Court stated (p. 648) that the phrase

"unfair methods of competition" belongs to that class of phrases the meaning and application of which must be arrived at by the "gradual process of judicial inclusion and exclusion." The Commission is, therefore, not limited by precedent in considering whether a particular practice constitutes an unfair method of competition within the meaning of the Act. It must consider each case upon its facts, and this Court will ultimately determine, upon the facts found by the Commission which are supported by evidence, whether the Commission was justified in concluding that the practices complained of fall within the statute. *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441, 453.

It is not contended that every practice which business men may regard as unethical is rendered unfair by Section 5. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475–476; *Northam Warren Corporation* v. *Federal Trade Commission*, 59 F. (2d) 196, 198 (C.C.A. 2d). But the sale by respondent of "break and take" candy does not involve merely a question of business ethics or good business manners; it is a reprehensible practice.

The reasons why some competitors decline to sell "break and take" packages are: (1) that the principal sales virtue of the "break and take" method of selling candy is in its appeal to the gambling instincts of children, and the method is, therefore, calculated to take unfair advantage of children; (2) that the sale of candy by the retailer by the "break and take" method is a sale by lot or chance and is in violation

of the lottery statutes of the several States; and (3) that the use of lottery devices in the sale of candy is injurious to the industry, because it tends to bring about competition in lottery devices rather than in candy.

It is because a substantial number of competitors who decline to sell "break and take" candy for these reasons, are injured, principally through the loss of trade to those manufacturers who, like respondent, do sell "break and take" packages, that the Commission regards the sale of candy in this manner as reprehensible, and "unfair" within the meaning of Section 5. Persons engaged in trade should not be compelled, in order to meet the competition of others, even though the latter be in the majority, to employ a practice the purpose of which is to take advantage of the cupidity and gambling instincts of children, or to contribute, by the sale of "break and take" packages, to the violation of the laws of the several States, or to the demoralization of competition in the industry.

It does not matter that respondent sells only full assortments and that the lottery is operated by the retailer. Respondent arranges its assortments in a manner which is intended to, and does, enable its retail customers to resell its candy by lot or chance, thus increasing its sales at the expense of its competitors who do not sell "break and take" candy. *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, 494. The fact that the sale of "break and take" candy is widespread in the industry

is not conclusive, because the *Winsted* case held also (pp. 493–494) that the widespread use of a practice does not prevent its use being an unfair method of competition where the practice is inherently unfair.

II. The findings of fact of the Commission, and the evidence, clearly establish that the sale of "break and take" candy is a method of competition within the meaning of Section 5. They show that the effect of the sale of "break and take" packages is to divert trade from a substantial number of competitors who decline to sell such packages.

III. The Commission's proceeding is in the public interest, for the reason, principally, that it appears that the entire industry is concerned. The public is interested also because the practice complained of is one calculated to take unfair advantage of children.

ARGUMENT

I

THE METHOD OF COMPETITION INVOLVED IN THE SALE BY RESPONDENT OF "BREAK AND TAKE" CANDY IS, UNDER THE CIRCUMSTANCES SET FORTH IN THE FINDINGS OF FACT OF THE COMMISSION, "UNFAIR" WITHIN THE MEANING OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

There are three requisites of a valid order of the Commission under Section 5 of the Federal Trade Commission Act: (1) the methods complained of must be methods of competition; (2) they must be "unfair"; and (3) the Commission's proceeding to

prevent their use must be in the public interest. *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 646–647; *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216. The existence in this case of the first and third of these requisites is considered hereinafter (*infra*, pp. 37–40). It is proposed to show at this point that the methods complained of are unfair.

The decision of the court below appears to have been rested on the ground that the sale of "break and take" candy by respondent was not shown to be unfair within the meaning of Section 5. It is apparent from its opinion that, in reaching this conclusion, the court relied largely upon the decision of this Court in *Federal Trade Commission* v. *Gratz*,[9] 253 U.S. 421, and particularly upon the following statement of the Court as to the meaning of the words "unfair methods of competition" (p. 427):

> They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

---

[9] That case involved the practice on the part of the respondent of refusing to sell steel ties unless the purchaser agreed to take a corresponding amount of jute bagging. The Court held that the practice of "tying" was not inherently unfair and that, in the absence of further facts, a complaint charging merely the use of this practice did not state a case under Section 5.

The court below expressed the view that respondent's acts did not tend to hinder competition because, "Whatever they did, their competitors could do." Answering the contention that respondent's practices are unfair methods because they constitute a breach of good morals, the court said that, "there is nothing in the case to show deception, fraud, or bad faith" affecting respondent's competitors or the ultimate consumer. It is submitted that there is no warrant for such a narrow application of the decision in the *Gratz* case, and that the court below failed to grasp the true meaning and intent of the statement just quoted from the Court's opinion in that case.

Clearly, the fact that competitors are free to adopt the same practice is no indication that that practice does not have the tendency to hinder competition. It will be shown (*infra*, pp. 27–34) that the sale of "break and take" candy by respondent and others not only has the tendency to hinder, but does in fact hinder, competition in the penny candy industry. The court below also appears to have overlooked the decision of this Court in *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, 493, where this Court held that, if the methods complained of are inherently unfair, it is no defense to the Commission's proceeding that honest competitors may protect their trade by also resorting to similar methods. It is the Commission's view that the methods complained of in this case are inherently unfair.

It will be shown, further, that the practices here involved are opposed to good morals because characterized by bad faith, and, therefore, are "unfair" within the decision in the *Gratz* case. In any case, the enumeration in that case, "deception, bad faith, fraud, or oppression," was not intended to be exhaustive, any more than the list contained in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28, of the ways in which a case may be in the public interest, was intended to be exclusive. See *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216, *supra*. If this is not clearly apparent upon the face of the opinion in the *Gratz* case, the history of Section 5 leaves no doubt in this respect. There is nothing in the *Gratz* case which will prevent the Court from examining anew the legislative history of Section 5.

It is proposed to consider first the origin of the words "unfair methods of competition", to show their intended scope. The grounds upon which the Commission decided that the sale of "break and take" candy is "unfair" will then be set forth. This will be followed by a brief consideration of certain contentions made by respondent in the court below, which were not noticed by that court, but which may again be urged here.

The Commission contends that the words "unfair methods of competition" were selected by Congress with the express purpose of providing a broad, flexible, all-inclusive standard. That they are not to be limited to particular classes of competitive

practices is demonstrated by the reports of the Congressional Committees made prior to the passage of the Act. The report of the House Conference Committee states (H.Rep. No. 1142, p. 19, 63d Cong., 2d Sess.):

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

The Senate Committee reported (Sen. Rep. No. 597, p. 13, 63d Cong., 2d Sess.):

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

This Court pointed out in *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 648, *supra*, that the bill which became the Federal Trade Commission Act originally declared "unfair competiton"

to be unlawful, and it was because these words, which had a settled meaning at common law, were thought to be too narrow, that the words "unfair methods of competition" were substituted. The Court stated that the phrase "unfair methods of competition" belongs "to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans*, 96 U.S. 97, 104."

Notwithstanding, therefore, that, apart from cases involving restraint of trade, the greater number of orders of the Commission which have been sustained in the courts, have happened to involve the element of deception in its strict sense, nevertheless, the Commission is not limited by precedent in considering whether a particular practice constitutes an unfair method of competition within the meaning of the Act. It must consider each case upon its facts, and this Court will ultimately determine, upon the facts found by the Commission which are supported by evidence, whether the Commission was justified in concluding that the practices complained of fall within the statute. *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441, 453.

It is not contended that every practice which business men may regard as unethical is rendered unfair by Section 5. Whether a particular practice is merely unethical or is "unfair" is a question of judgment, to be exercised by the Commission in the

first instance, subject to review by the courts, having regard to the broad purpose of the statute, namely, to maintain free and fair competition.

This Court stated in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475–476, that the Commission

> has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes [the Federal Trade Commission Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.

To the same effect is the dictum in the case of *Northam Warren Corporation* v. *Federal Trade Commission*, 59 F. (2d) 196, 198 (C.C.A. 2d),[10] relied upon by the court below, that the Federal Trade Commission Act "does not purport to establish a decalogue of good business manners or morals." The Commission does not quarrel with this. Its position is that the sale by respondent of "break and take" candy does not involve merely a question of business

[10] Although the court below seemed to place some reliance on that case, the facts in that case are hardly pertinent to the questions here involved. The Commission's order there was directed against the use of testimonial advertising in which the testimonials themselves were truthful, but there was a failure to disclose that they were paid for. The court held that the public was not misled by this, because, "It is doubtful if the public is gullible enough to believe that such testimonials are given without compensation."

ethics or good business manners, but, as a method of competition, is reprehensible, and is, therefore, clearly unfair within the meaning of Section 5. It is contended that the large number of competitors who decline to employ lottery devices in order to further their sales of penny candy are not merely excessively conscientious. It cannot be said that they have their own superior moral sense to blame, if, as a result of their attitude, trade is diverted from them to respondent and other manufacturers who do not hesitate to sell their candy for resale by the "break and take" method. It is the Commission's view, on the contrary, that for reasons which will presently be made to appear, the competitors who decline to sell "break and take" candy are clearly justified in their attitude, and they, together with those competitors who, while they do sell this kind of candy, would prefer not to do so, but find it necessary, in order to meet the competition of others who sell lottery assortments, are entitled to be afforded the protection of the Federal Trade Commission Act.

The reasons why some competitors decline to sell "break and take" packages, which are also the grounds on which the Commission considers their sale by respondents to be an unfair method of competition, are: (1) that the principal, if not the sole, sales virtue of the "break and take" method of selling candy is in its appeal to the cupidity and gambling instincts of children, who are the principal purchasers of this candy, and that it is, therefore, calculated to take unfair advantage of children;

(2) that the sale of candy by the "break and take" method is a sale by lot or chance, and this is contrary to public policy and in violation of the lottery statutes in many, if not all, of the States; and (3) that the use of lottery devices in the sale of candy tends to demoralization of the candy industry, because it promotes competition in lottery devices, rather than in candy.

That the "break and take" method is employed because of its appeal to the gambling instincts of children is made clear from the Commission's findings (*supra*, pp. 7, 8) and the evidence (*supra*, pp. 13, 15–16). It appears that "break and take" candy is sold at retail mostly by small dealers whose shops are located near schools and attract the trade of school children. (*Supra*, pp. 7–8.) When both "straight" goods and "break and take" packages are displayed side by side, the child will purchase "break and take" candy in preference to the other, because of the possibility of winning a premium or prize. (*Supra*, p. 8.) The Commission found that (Par. Thirteen, R. 22):

> the children almost without exception purchase the candy which offers a chance to win a prize or premium rather than candy which does not have a lottery or gaming feature in connection with its sale, irrespective of the difference in size of the pieces, or the difference in quality of the two types of candy.

As this finding indicates, the preference of a child for the candy with the lottery feature is not the result of any deliberate weighing of the comparative value of the two kinds of candy. The court below assumed

the contrary, ignoring the evidence and the Commission's findings, when it said that although the child knows, when he purchases a piece of "break and take" candy, that the quantity he receives is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for the opportunity to obtain a prize. (R. 375–376.) It is clear, however, that the child does not stop to reason, but is impelled to purchase the lottery candy by the hope of obtaining something for nothing.

It may be noted that the pieces of candy in the "break and take" packages are invariably either smaller in size or poorer in quality than the corresponding pieces of "straight" goods candy. (*Supra*, p. 6.) In the case of respondent's "break and take" goods, the pieces are smaller in size than its "straight" goods candy (*Ibid.*) If the child stopped to reason, i.e., to consider his chances of winning a premium or prize, his preference for the "break and take" candy might disappear. Of respondent's "break and take" assortments, it appears that in the "Chocolate Penny Men" assortment, only 4 out of 120 pieces of candy in the package contain pennies, so that the child has but one chance out of 30 of winnng a premium. (*Supra*, p. 4.) In the "School Days 200" assortment, only 20 out of 200 pieces of candy have pink or chocolate centers, and carry prizes. (*Supra*, p. 5.) Furthermore, the display cards accompanying these two assortments give no indication of the number of pieces which carry premiums or prizes, or of the

chances which a child has of winning a premium or prize.[11] It is readily apparent, therefore, that the children act blindly in preferring the "break and take" candy over the "straight" goods. As one witness testified (*supra*, p. 15), "Reason would prompt them to take the better value for every penny that they spend, but the gambling instinct prompts them to try to get something for nothing." In some instances chidren go so far as to purchase a piece of candy, break it open, and if the center is not of a prize-winning color, throw it away and purchase other pieces until a prize is obtained or their money is gone. In other instances children who win a prize or premium give it away to other children, and continue to make further purchases. (R. 20.)

The general prevalence of lottery statutes in this country indicates ample recognition of the fact that the gambling instinct is strong, even in adults. A child particularly may not be expected to stop to consider the value of his bargain when confronted with the apparent opportunity to win a "free prize." In *Champion* v. *Ames*, 188 U.S. 321, sustaining the constitutionality of a Federal lottery statute, this

[11] The court below was not justified, therefore, in stating that the display cards accompanying respondent's merchandise "contain a complete, fair and accurate description of the sales plans." It is true that in the one assortment described as "1, 2, 3, Big Chief 60s", the display card reveals that 10 of the bars sell for 1¢ each, 10 for 2¢ each, and 40 for 3¢ each. (*Supra*, pp. 4–5.) However, there is no reason to believe from the evidence that even where the number of chances of winning a premium are disclosed in this manner, the child gives any consideration thereto.

Court (p. 358) referred to the lottery business as an evil of "appalling character." In *Brooks* v. *United States*, 267 U.S. 432, 437, this Court stated that the object of the statute that was sustained in the *Ames* case was, by prohibiting the carriage of lottery tickets in interstate commerce, to prevent the demoralization, "through a spread of the gambling habit," of individuals who were likely to purchase them. For these reasons, the use of lottery devices to induce purchases by children takes unfair advantage of the children, and such a practice would seem, therefore, to be opposed to good morals because characterized by bad faith, as that term is used in the *Gratz* case, *supra*.

Many of the candy manufacturers who decline to sell "break and take" packages refrain from doing so because of the illegality believed to be involved in the use of lottery devices. (*Supra*, p. 14.) The Commission found that the sale and distribution of candy by lot or chance is against the public policy of many of the States, some of which have laws making the use of lotteries and gaming devices penal offenses (*supra*, p. 8.) There are, in fact, lottery statutes in all the States.[12] The Commission found, in addition, that the sale of "break and take"

[12] Appendix B to the petition for a writ of certiorari in this case is a list of State statutes prohibiting lotteries, gift enterprises, etc.

candy at retail[13] is a sale by lot or chance and constitutes a lottery. (*Supra*, p. 8.) This finding was not questioned by the court below; similar practices have been held to be in violation of lottery statutes in several cases. For example, see *United States* v. *One Box of Tobacco, "Foot Prints"* 190 Fed. 731 (C.C.A. 4th); *United States* v. *Jefferson*, 134 Fed. 299 (C.C.W.D. Ky.); *Hull* v. *Ruggles*, 56 N.Y. 424; *State* v. *Clarke*, 33 N.H. 329; *Holoman* v. *State*, 2 Tex. Ct. App. 610; *People* v. *Runge*, 3 N.Y. Crim. Reports 85.

The third reason assigned by some competitors for preferring not to sell "break and take" packages, and one of the three grounds on which the Commission reached its conclusion in this case, is aptly presented in the dissenting opinion of Judge Woolley, where he said (R. 380):

> Differing in a way that makes the trading stamp system look almost commendable, the petitioning candymaker in this case not only entered into competition for the penny candy trade with smaller candy units, but, stepping outside of commerce, injected into its competition a gamble which has made its competitors

[13] As this finding indicates, the Commission did not proceed upon the theory that respondent is itself violating the lottery statutes, but on the theory that respondent sells its product intending that it should be resold in a manner involving lot or chance in violation of the local lottery laws and public policy. No claim is made that respondent violated the Federal lottery statutes. Section 213, Criminal Code (U.S.C., Title 18, Sec. 336); Section 237, Criminal Code (U.S.C., Title 18, Sec. 387).

> contest with it not only for the purchasing trade but for the speculating public. To sell their goods, its competitors have to compete with the petitioner not only in wares and prices but by devising and putting into practice more seductive gambling schemes. This, I think, is not commerce; it is merchandising chance instead of candy. Aside from any question of morals, I regard it unfair.

The assertion that it is merchandising chance instead of candy, is taken from the mouth of one of the witnesses in this case. (R. 306.) That the use of lottery devices will lead to competition in those devices rather than in quality or price is borne out by the Commission's finding (*supra*, p. 7) that the gambling element is more attractive to the child than the quality or the size of the piece of candy. A practice which makes competition depend, not on price, quality or service, but on the seductive character of the gambling devices employed to induce sales would seem for this reason alone to be an unfair method of competition, whether or not it is wrong to gamble, and quite aside also from the legality of such devices under State statutes.

It is the Commission's view, in short, that persons engaged in trade should not be compelled, in order to meet the competition of others, even though the latter be in the majority, to employ a practice the purpose of which is to appeal to, and to take advantage of, the cupidity and gambling instinct of children, or to contribute, by the sale of "break and take" packages, to the violation of the laws of the

several States, or to the demoralization of competition in the industry. The decision of the lower court, if allowed to stand, would have the further effect of leaving in the hands of less scrupulous manufacturers a powerful competitive weapon to be used against those whose moral convictions will not permit them to employ the practices complained of in this case, and who will, therefore, stand by and see their trade gradually diverted from them, rather than employ methods which they regard as reprehensible.

It is clear from the Commission's findings (*supra*, pp. 7–9) and the evidence (*supra*, pp. 12–14) that there are a substantial number of competitors, though they may be in the minority in the industry, who, although as a result their trade is diverted from them, decline to sell "break and take" assortments of penny candy. There are, in addition, some who would prefer not to sell "break and take" candy, but who do so, despite this preference, in order to meet competition in such candy. (*Supra*, p. 14.) It is worthy of emphasis, also, that some of those who decline to deal in "break and take" candy find that their customers purchase their entire candy needs, including "straight" goods, from competitors who do sell the "break and take" packages. (R. 134, 174, 277, 283.) Under these circumstances, it is submitted that the Commission correctly decided that the method of competition involved in the sale by respondent of "break and take" candy is unfair within the meaning of Section 5.

In the court below respondent urged that no unfairness may be charged against it, since it sells only full

assortments, and it is the retailer who sells by the "break and take" method. It was contended (1) that at the time of the employment of the sales methods in question, respondent's candy assortments were no longer in interstate commerce and were, therefore, beyond the jurisdiction of the Commission, and (2) that in any case respondent could not be held responsible for the acts of its retail customers. These arguments are founded upon a misconception of the theory upon which the Commission is proceeding. The Commission is not seeking to regulate the acts of respondent's customers, the retailers, nor to impose responsibility upon respondent therefor. Rather the Commission is seeking to prevent the respondent from unfairly increasing its sales at the expense of its competitors (i.e., those who do not sell lottery packages) by placing in the hands of its retail customers the means of accomplishing this result. In this respect this case is not unlike *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U.S. 483, *supra*, which involved an order of the Commission prohibiting the respondent, a manufacturer, from attaching misleading labels to its products. The respondent there appears to have urged that its immediate customers, retail dealers, were aware that the labels were false and they were, therefore, not deceived; and that if the ultimate customer was deceived, the retail dealers were alone responsible therefor. But this Court held (p. 494):

> The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but

> also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.

That case, it is true, involved deception, but the principle there applied is also applicable here. There, the retailers might, if they chose, have avoided causing any deception by removing the labels or making known their falsity. Here, the retailer may, if he chooses, sell respondent's "break and take" candy without using the lottery features.[14] However, just as in the *Winsted* case the false labels were attached for the very purpose of enabling the retailer to deceive and with the intention that he should do so, so in this case, as the Commission found (*supra*, p. 6), it was respondent's purpose, in packing its assortments in the manner previously described, that they should be resold by the retailers by lottery.

The decision in the *Winsted* case also answers the further contention of respondent based upon the widespread use of the "break and take" method in the candy industry. The Court held in that case that the widespread use of a practice does not pre-

[14] This does not apply to the "Chocolate Penny Men" assortment in which in 4 of the 120 pieces of candy a penny is concealed. (*Supra*, p. 4.).

vent its being an unfair method of competition, saying (pp. 493–494):

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice.

It is not denied that in a particular case the fact that a large number in the industry employ the practice complained of may be entitled to some weight in considering whether the practice is unfair within the meaning of the Act. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, 475, *supra*. Where, however, the practice complained of by the Commission is intrinsically unfair, as was the practice involved in the *Winsted* case, and as is the practice here involved, the fact that it is in widespread use in the industry does not take it out of the statute.

II

THE FINDINGS OF FACT OF THE COMMISSION AND THE EVIDENCE CLEARLY ESTABLISH THAT THE SALE OF "BREAK AND TAKE" CANDY IS A METHOD OF COMPETITION WITHIN THE MEANING OF SECTION 5

The court below did not question the fact that the sale by respondent of "break and take" candy is a method of competition within the meaning of Section 5, and the contrary cannot be successfully urged.

The Commission's findings (*supra*, pp. 7, 9), amply supported by the testimony (*supra*, pp. 12–14), show that the effect of the sale of "break and take" packages is to divert trade from competitors who decline to sell such packages. These, although a minority in the industry, are substantial in number.

Respondent sought in the court below to bring this case within the decision of this Court in the *Raladam* case, *supra*, urging that the great majority of penny candy manufacturers employ the methods complained of by the Commission. The *Raladam* case was decided, however, on the ground (pp. 652–653) that the record lacked sufficient evidence to show that *any* competitors were injured. The opinion of the Court definitely implies that if there were any substantial number of honest competitors who were injured, irrespective of whether they constituted only a small minority of all those engaged in the business, the decision would have been the other way. The Court said (pp. 647–648):

> The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of *some substantial competition* to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance. Compare *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 297–299. (Italics ours.)

Again at page 649, the Court said:

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.

Not only are a substantial number of competitors shown to be injured in this case, but the Commission found, also, and the evidence shows, that some of those who sell "break and take" candy have begun to do so in order to meet the competition of other manufacturers who sell such candy. (R. 19; *supra*, p. 14.) Such persons are, therefore, also affected.

III

THE ACTION OF THE COMMISSION IS TO THE INTEREST OF THE PUBLIC

There can be no question that the Commission's proceeding is in the public interest. In the court below respondent characterized this case as involving "a purely private controversy between the majority and minority candy manufacturers of the country." The fact that on respondent's own statement the entire industry is concerned, would seem sufficient without more to establish the public interest. Describing the controversy as a "purely private" one does not make it such and does not bring this case within the decision of the Court in *Federal Trade*

Commission v. *Klesner*, 280 U.S. 19, *supra*. In that case the order of the Commission involved a dispute merely between two small traders in the District of Columbia.

The public is interested not only because the entire penny candy industry is involved, but also because the practice complained of is one calculated to take unfair advantage of children, who are the principal purchasers of "break and take" candy. The practice is, therefore, equally unfair to them as to the competitors who are injured. As stated by Judge Woolley in his dissenting opinion (R. 378):

> If the methods of sale be unfair to the purchasing children, they are unfair to a part of the public, indeed to the whole of the public which purchases candy in small quantities at penny prices. If the methods of sale be unfair to competitors in the manufacture and sale of candies in the same trade, they are unfair to another part of the public. Stated crudely, there are in this case two publics, each with a different yet specific and substantial interest. To stay a wrong inflicted upon either by unfair methods of competition is clearly within the jurisdiction of the Federal Trade Commission..

Respondent made the contention in the court below that the Commission lacks jurisdiction to enforce the anti-lottery statutes. This erroneously assumes that the Commission is seeking in this proceeding to enforce those statutes, whereas the Commission rests

its case entirely upon the Federal Trade Commission Act. If the conclusion of the Commission that there are present the elements of an unfair method of competition under Section 5, is sound, the Court would not be justified in holding that section inapplicable merely because the order of the Commission would tend incidentally to aid in the enforcement of other laws, e.g., the State anti-lottery statutes, or because, if the latter statutes were rigidly enforced, this would remove the unfair competition complained of. Moreover, as previously indicated, the existence of the lottery statutes and the consequent illegality of the retail sale by the "break and take" method is not the sole ground upon which the Commission concluded that the sale of "break and take" candy is unfair. An effort has been made to show that apart from the illegality involved, the use of lottery devices is not a fair way to obtain the trade of children; and is an unfair competitive practice for the additional reason that it is injurious to competition in the candy industry. If the sale of "break and take" assortments of candy is for these reasons in fact unfair within the meaning of Section 5 it, would seem unreasonable to hold that Section 5 is, nevertheless, inapplicable merely because it also happens that the resale at retail of "break and take" candy runs counter to the lottery statutes of the several States.

CONCLUSION

All the elements of a case under Section 5 are present. The methods complained of are "unfair." A substantial number of honest competitors are in-

jured, and the methods complained of are, therefore, methods of competition. The Commission's proceeding is in the public interest. It is respectfully submitted that the decree below should be reversed, with directions to affirm the Commission's order.

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NOVEMBER 1933.

APPENDIX

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and

appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall

have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall cer-

tify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 194

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Respondent appears to rely largely on the proposition that in order to be unfair within the meaning of Section 5, a practice must involve restraint of trade or deception. It asserts that (Brief, p. 44), "It is not all practices against morals which are condemned but those only which involve the elements of deceit or monopoly." The Commission contends, on the other hand, that the question of unfairness cannot be decided by so simple a test as whether deception or restraint of trade is involved, and, as pointed out in the main brief (pp. 24–25), this Court has not so narrowly restricted

the meaning of the phrase "unfair methods of competition."

As indicated in *Federal Trade Commission* v. *Beech-Nut Packing Company,* 257 U.S. 441, 453, each case must be decided on its own facts; the Commission must examine into the actual effect of the practice complained of upon the consuming public and upon competitors. The evidence in the record in this case discloses that the "break and take" method of selling penny candy is calculated to, and does in fact, take unfair advantage of the children who purchase it. Contrary to the assumptions indulged in by the court below and by respondent (Brief, p. 32) the child does not know all the facts, and does not deliberately choose the "break and take" candy because he is willing to obtain a smaller piece of candy in exchange for the opportunity to win a prize.

The fact is, as pointed out in petitioner's main brief (pp. 29–30), that the child does not make a conscious choice, but is lured into purchasing the "break and take" candy by the hope (vain to the extent of 180 chances against the child, for example, in the School Days 200 assortment) of obtaining something for nothing. He hopes to receive a "free prize," and does not stop to consider that he may have very limited chances of success. The fact, which is conceded by respondent (Brief, p. 31), that the child pays no attention to what his chances of winning may be, would seem to prove

conclusively that he acts blindly in preferring the "break and take" over the "straight goods" candy, being deluded by the appeal to his cupidity and gambling instinct.

In this respect it is interesting to note, and it is submitted, that inducing purchases by appealing to the cupidity and gambling instincts of children is assimilable to deception, is opposed to good morals in very much the same way that deception is, and is, therefore, within the ruling in the *Winsted* case, 258 U.S. 483, and the language of *Federal Trade Commission* v. *Gratz*, 253 U.S. 421. Deception operates unfairly to influence purchase because the buyer is not exposed to the normal effect upon his purchasing judgment of all the facts. Some are withheld or misstated. If the truth were known he would probably not buy. Appealing to the cupidity and gambling instincts of children operates unfairly to influence purchase, because though the buyer knows all the facts (we assume here that the extent of the gambling chances is made known), they do not operate upon his purchasing judgment with normal effect, for the reason that the presence of the gambling appeal diverts him from considering either the unlikelihood of winning or the probable inferiority in size or quality of the candy.

In the one case, the unfairness is due to the absence of the true facts. In the other case,

the unfairness is due to the circumstance that, while the true facts are present, they are overshadowed in the mind of the purchaser by the gambling appeal, and thus the situation is as if the true facts were not present. In the one case, the purchase is made because the true facts are not present. In the other, the purchase is made in spite of their presence. In both cases, a device, deception in the one and the arrangement of candies for a gambling appeal in the other, is what causes the buying; both devices are unfair to the purchaser, and hence to the competitor who does not use them. The child would seem to be as much entitled to protection against an unfair sales practice in respect to penny candy as is the adult in respect to a woolen garment.

What has just been said clearly distinguishes the present case from the case of *N. J. Asbestos Company* v. *Federal Trade Commission*, 264 Fed. 509, upon which respondent relies. That case involved the practice merely of providing free entertainment to customers in order to promote good will. The element of unfairness to the consumer in inducing particular purchases, which is present in the instant case, was not present there.

Respondent asserts (Brief, p. 34) that the arguments in petitioner's main brief are "directed toward the mere ethics" of the sales method in question. Elsewhere in its brief (p. 38) respond-

ent states that the Commission is seeking to encroach on the functions of other regulatory agencies and to assume a paternalistic control over all types of business practices in commerce. Again, it is said (Resp. Brief, p. 37) that the Commission has no power broadly to prevent gambling. These assertions are not helpful to respondent.

The Commission does not claim to be vested with power to prevent gambling, or to impose ethical standards on business men, or to exercise any function other than that provided for in Section 5 of the Federal Trade Commission Act. Its contention is that upon the facts in the record in this case, it is clear that the "break and take" method of selling penny candy is unfair within the meaning of Section 5, both to consumers, and to competitors who do not employ that method of selling their products.

Respondent asserts (Brief, p. 36) that if Congress had intended that the sales methods here involved should be prohibited as lotteries it could have enlarged the scope of the Federal anti-lottery laws. Respondent also urges in effect that the local anti-lottery laws are not being strictly enforced, and that the Commission should not assume to restrict practices which the local authorities do not themselves undertake to prevent. This is answered by the *Winsted* case, *supra*. The practice there condemned (false labeling) violated the local

laws against the obtaining of money by false pretenses. Nevertheless, this Court did not feel obliged to forbid the Commission to restrain the use of deception as an unfair trade practice, merely because it was also a violation of the criminal laws of the States, whether or not those laws were being enforced.

Respondent (Brief, pp. 45–49) challenges the sufficiency of the evidence to show any substantial effect of the practice here involved upon competition. The record does not indicate the exact extent of the competition which is affected, but there can be no question that it is substantial. Representatives of 9 competitors of respondent appeared to testify. The names of these competitors are listed at page 12 of petitioner's main brief. The evidence indicates that some 70 members of the National Confectioners Association do not sell "break and take" candy.[1] (Petitioner's Main Brief, p. 14.)

Respondent seeks to attach some sinister significance to the fact that the National Confectioners Association has taken a position opposed to the use

[1] Respondent points out (Brief, p. 47) that some of its competitors who do not sell "break and take" candy fail to do so because their type of merchandise is not suited to this method. This fact, if true, tends to refute the lower court's assertion (R. 375) that what respondent does, its competitors are free to do. If there are competitors who cannot employ the same method, they are all the more entitled to protection.

of the "break and take" method. This fact would, however, seem rather to indicate that a larger number of competitors are opposed to the use of this method of selling penny candy than the record otherwise indicates. It is not material, and it is not incumbent upon the Commission to show, the exact portion of the industry that is adversely affected by the practice complained of. It is sufficient that it clearly appears that trade is diverted to respondent and others from a substantial number of competitors who do not employ the practice complained of. *Federal Trade Commission* v. *Raladam Company,* 283 U.S. 643.

The opinion in the *Raladam* case also points out (p. 651) that it is not necessary to show that any particular traders are injured. The evidence shows (Petitioner's Main Brief, pp. 12–16) that the "break and take" method of selling candy is generally injurious to the business of manufacturers of "straight goods," and it necessarily follows, as the Commission found (Par. Nine, R. 19), that the use of this method by respondent injuriously affects the sale of "straight goods."[2]

The attempt of respondent to show (Brief, p. 24) that the "break and take" method of selling candy has been universally recognized as a legitimate

[2] The finding of the examiner quoted at page 8 of respondent's brief was not adopted by the Commission and is, therefore, of no effect. It is not, however, in any way inconsistent with the findings of the Commission.

trade practice over a long period of years, and has been so regarded by the Commission in the past, is without basis in fact. Respondent refers to no evidence of record or other authority in support of its assertions. The only evidence in the record indicates that while candies with pennies concealed in them have been sold for many years, "break and take" candy generally did not become a competitive factor until after 1922 or 1923 (R. 126, 154). At that time the National Confectioners Association sought to terminate the use of that method of selling candy by voluntary action of the industry (Petitioner's Main Brief, pp. 11–12, 14). There appears to have been continuous conflict within the industry over the question. Compare *Federal Trade Commission* v. *Algoma Lumber Co.*, No. 240, decided January 8, 1934.

So far as the prior attitude of the Commission is concerned, the records of the Commission indicate that it had issued 5 complaints prior to the time when the present proceeding was instituted, one of which was dismissed, and a stipulation filed to the effect that the defendant would discontinue the practice (Docket 1165—Robert F. MacKenzie Company, complaint issued May 9, 1924); two resulted in cease and desist orders (Docket 1304—Reinhart & Newton Company, complaint issued April 1925; Docket 1370—Lauer & Suter Company, complaint issued March 9, 1926); and two other similar complaints were dismissed without any

reasons for the dismissal being stated. It is quite impossible, therefore, to infer any administrative approval of the "break and take" method in the past.

Certain other contentions of respondent are here briefly noted:

Respondent urges (Brief, pp. 30–31) that the Commission argues for the first time in this Court that the practice complained of involves bad faith; that there is no such charge in the complaint, and that the charge was expressly disclaimed by counsel for the Commission. The record references (R. 70, 71) do not support the assertion that counsel for the Commission disclaimed any charge of bad faith; the disclaimer related only to charges of false advertising or deception. The complaint fully sets forth the practice complained of, and the failure of the complaint to characterize the practice as involving bad faith does not prevent the Commission from arguing in this Court that bad faith is involved, particularly when the court below (R. 375) held to the contrary.

With respect to respondent's objection (Brief, pp. 52–53) that paragraphs 4 and 5 of the Commission's cease and desist order are too broad in that they prohibit the packing and assembling of respondent's assortments, the contention being that packing and assembling are not commerce, the Court's attention is directed to the introductory paragraph of the cease and desist order (R. 26)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 194.

FEDERAL TRADE COMMISSION, *Petitioner*

v.

R. F. KEPPEL & BRO., INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 371) is reported in 63 Fed. (2d) 81.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered January 25, 1933 (R. 383). The

petition for certiorari, under extension of sixty days duly obtained from a Justice of this Court, was filed June 21, 1933. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 5 of the Federal Trade Commission Act.

QUESTION PRESENTED.

Whether the business practices of respondent as hereinafter described constitute unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717).

STATEMENT.

Respondent is a Pennsylvania corporation which has been engaged since 1918 in the business of manufacturing candy in Lancaster, Pennsylvania, and selling it to wholesale dealers and jobbers in Pennsylvania and other states. Petitioner also buys and sells candy manufactured by others.

Among the products of respondent, which it sold and distributed to wholesale dealers and jobbers in interstate commerce in competition with other candy manufacturers when the complaint was filed, were certain packages or assortments of candy as follows:

(a) Assortments in which were contained larger pieces of candy or articles of merchandise to be given as prizes, dependent upon the color of the centers of said candies; (b) assortments in which slips of paper were contained in each wrapper, upon which were printed varying prices to be paid for said candy or that it was free; and (c) assortments containing a number of pieces in which a sum of money was concealed. Respondent has however long ceased to place money in its candy as described in (c).

With its said assortments of candy, respondent furnished display cards truthfully describing the sales plans men-

tioned. The wholesale dealer and jobber customers of respondent resold the assortments to retailers who sold to the purchasing public, but title to the merchandise passed from respondent completely with the sale to the wholesale dealers and jobbers.

The Federal Trade Commission filed complaint on May 2, 1930, charging that the sale of the candy assortments in the manner described was an unfair method of competition in commerce in violation of said Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, 719). After the filing of answer and taking of testimony, the Federal Trade Commission issued an order directing respondent to cease and desist from packing and selling its product under the sales plans described in (a), (b) and (c) above and furnishing the display cards describing the sales plan, as aforesaid. Complete copy of said order appears in the record (R. 25). Thereupon respondent herein filed its petition for review (R. 333-344) before the Circuit Court of Appeals for the Third Circuit, which, after argument (Woolley, Davis and Thompson, Circuit Judges, sitting) rendered its opinion and judgment in favor of respondent herein on January 25, 1933, as aforesaid, one judge dissenting (R. 371-382).

The opinion quotes with approval from the case of *Northam Warren Corporation v. Federal Trade Commission*, 59 Fed. (2d) 196, wherein it was held that the use of paid testimonials for advertising purposes without disclosing that payment was made therefor was not an unfair method of competition in commerce, to the effect that

> The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade.

The court then sustains the contention of respondent in the following language:

The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. Other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner. The testimony shows that a decided majority of candy manufacturers did in fact use similar methods. There is nothing in the petitioner's practices tending to hinder competition or create monopoly.

The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer. Display cards sent by the petitioner to accompany the merchandise contain a complete, fair, and accurate description of the sales plans. The consumer receives a piece of candy for his cent and, although he knows that the quantity is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for his opportunity to obtain a prize.

The learned Circuit Court of Appeals thereupon concluded that upon a reasonable construction of the Federal Trade Commission Act the Commission had no jurisdiction to make the "cease and desist" order under review, and entered its order accordingly (R. 383).

ARGUMENT.

The ruling of the Circuit Court of Appeals for the Third Circuit is in complete accord with the principles laid down by the pertinent decisions of this Court bearing on the scope of the Federal Trade Commission Act and the jurisdiction of that Commission thereunder. For the Court's convenience this will be shown under specific headings.

The Complaint in This Case Did Not Aver, nor the Evidence Show, the Existence of Unfair Methods of Competition in Commerce.

To demonstrate the soundness of this proposition, a consideration of the judicial definition of the term "unfair methods of competition" is necessary; and, for reasons hereinafter pointed out, this in turn requires an examination of the judicial definition of the term "monopoly". Before entering upon this examination, however, it will clarify the case to point out first that this Court in *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, 647-648, 650, recognized the jurisdiction of the Commission to be limited by its province to aid in the enforcement of the general governmental anti-trust and anti-monopoly policy, approving the conclusion of the Circuit Court of Appeals for the Sixth Circuit to the same effect (42 Fed. (2d) 430). In that case this Court, after considering the legislative history and objects and purposes of the Federal Trade Commission Act, said (p. 650): (Italics ours)

> * * * In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words "unfair methods" was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; *that unfair competition was that practice which destroys competition and establishes monopoly.* These and similar statements run through the debate from

beginning to end. Although protection to the public interest was recognized as the ultimate aim, comparatively little was said about it.

A further discussion of the legislative history of the Federal Trade Commission Act appears in the dissenting opinion of Justices Brandeis and Clarke in the case of *Federal Trade Commission v. Gratz*, 253 U. S. 421, 433-436.

Turning now to the definition of "unfair methods of competition", in the *Gratz* case, *supra*, where the practice complained of was the refusal of respondents to sell steel ties for binding bales of cotton unless the prospective purchaser would also buy the jute bagging used to wrap the cotton, this Court defined that term as used in the Federal Trade Commission Act as follows (pp. 427-428):

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

This definition has been approved in all the later cases. See for example, *Federal Trade Commission v. Beechnut Company*, 257 U. S. 441, 453, and *Federal Trade Commission v. Raymond Company*, 263 U. S. 565, 572.

Thus we have a definition with two branches, viz., practices opposed to good morals and practices against public policy, but each branch contains specific limitations which may not be ignored. It is not sufficient that practices be merely opposed to good morals nor that they be merely against public policy, as the Commission claims in its at-

tempt to broaden its jurisdiction beyond the prior decisions on the subject. It is not enough to take either of the broad expressions "good morals" and "public policy" without the limitations thereon indicated and carefully applied by this Court. Instead the breach of good morals must arise from "deception, bad faith, fraud or oppression"; and the breach of public policy must arise "because of the dangerous tendency unduly to hinder competition or create monopoly." Thus these two lines of opinion can be condensed into the ideas of deception and monopoly. No court has broadened the definition of unfair competition so as to include any case which would not fall within one or the other of these two classes.

Now "monopoly", *i. e.,* practices which tend to restrain trade or create monopoly within the Act, involve resale price maintenance plans, coercion of manufacturers by jobbers through threats of refusal to deal, and similar situations. *Hills Bros. Co. v. Commission,* 9 Fed. (2d) 481; *Cream of Wheat Co. v. Commission,* 14 Fed. (2d) 40; and *Southern Hardware Jobbers' Association v. Commission,* 290 Fed. 773. But note in this connection that in *Federal Trade Commission v. Sinclair Refining Company,* 261 U. S. 463, this Court held that the furnishing by oil refiners to dealers of pumps for nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition.

With this understanding of the scope of the Act, the Commission's order was manifestly improvident because *there was not averred in the complaint, and could not upon the proof subsequently adduced have been averred, facts to show either that competition was being restrained or monopoly created or that there was deception of the public or of competitors.*

There was no charge in the complaint that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which to them seems desirable,

or any restriction upon the right of the jobbers who dispose of respondent's candies to handle those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. There is no charge in this case that respondent refuses to sell to its customers unless they will agree to refrain from purchasing the candy of other manufacturers. Hence the situation before this Court in the case of *Sinclair Refining Company, supra,* might be said to go further in its tendency to create monopoly than that here involved, but the Court had no difficulty in finding that there was no unfair competition; *a fortiori,* there can be no such competition in the instant case.

Nor was there any allegation in the complaint in this case of misrepresentation, deception or fraud. On the contrary, during the trial counsel for the Commission expressly disclaimed any attempt to charge respondent with a "false, misleading or untrue statement" (R. 70) or with "any intention to deceive the public or the consumer" (R. 71); and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case."

This failure of the complaint alone is fatal to the Commission's case, for this Court held in the *Gratz* case, *supra,* that the Commission's order "should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court". Indeed, in comparison with the complaint in that case, set forth by this Court on pages 425-426 of its opinion, the complaint in the instant case, appearing at pages 2 to 6 of the record, shows no substantial difference. Each, after stating that the proceeding is brought under Section 5 of the Act, acting in the public interest, and charging unfair methods of competition, identifies the parties and specifies in detail the practices complained of. The complaint in the *Gratz* case then states that the acts specified "were committed with the purpose,

intent and effect of discouraging and stifling competition in interstate commerce". In the instant case the complaint specifies that the practices "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce," etc. Similarly, the complaint in this case did not charge "unfair competition within the proper meaning of these words", and the order therefore is a nullity. Cf. *Philip Carey Manufacturing Company v. Commission,* 29 Fed. (2d) 49, where it was held a similarly deficient complaint could not be remedied on appeal.

Aside from the insufficiency of the complaint, there was no evidence of "monopoly", for there is an utter absence in the record of any evidence of coercion, refusal to deal, and the like. Nor was there any evidence of "deception". Indeed, it is not disputed that an entire box of respondent's "break and take" candy contains as much value as any box of straight goods (R. 72) and that respondent makes no greater profit on one kind than the other. The objection is that the value is not distributed equally between the customers. But this is not deception or bad faith.

The record discloses that consumers of this penny goods know precisely by what method of retailing the candies are being disposed of and know the size of the candies they are purchasing; and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness; but on the contrary, as recognized by the Circuit Court of Appeals, explicit information is available to the consumers in carefully prepared and truthful display cards.

It is submitted petitioner has neither averred or proved in this case the existence of any unfair methods of competition in commerce, within the meaning of the Federal Trade Commission Act.

This Case Does Not Involve a Substantial and Specific Public Interest.

The second prerequisite to the validity of an order of the Federal Trade Commission to cease and desist depends upon the presence of public interest, which this court in the case of *Commission v. Klesner,* 280 U. S. 19, held must be "substantial" and "specific". Furthermore, injury to that public interest must be shown from some practice "characterized as deception, fraud or even unfairness", as held in *Berkey & Gay v. Commission,* 42 Fed. (2d) 427, following the opinion of this Court in the *Gratz* case; or a tendency to create monopoly. *Federal Trade Commission v. Raymond Company, supra.*

Hence the two concepts of unfair methods and public interest both depend on monopoly or deception; but it is important to note that public interest even if existent in a given case, can not alone confer jurisdiction on the Commission. As pointed out by this Court in the case of *Raladam Company, supra,* the object of the Act is to protect competitors; and the object of protecting the public interest, while of paramount importance, does not confer additional jurisdiction on the Commission but merely limits the jurisdiction already conferred to handle cases of unfair competition in commerce; so that there must be unfair methods in competition first, and, in addition, public interest which is specific and substantial, before a proceeding by the Commission is justified.

This case fails to show the substantial and specific public interest which is essential to the issuance of a valid order by the Federal Trade Commission, *Federal Trade Commission v. Klesner,* 280 U. S. 19, 28, and *Federal Trade Commission v. Raladam Company, supra,* page 649. The proof shows an absence of a substantial number of competitors affected by the methods criticized. The evidence before the Federal Trade Commission shows that the great majority of the candy manufacturers of the United States

employ the distribution methods of which petitioner complains in this proceeding. As shown by the record (R. 324), 380 out of 450 active members of the National Confectioners Association manufactured and sold "break and take" candies, *i. e.*, only 15 per cent of the candy manufacturers in the Association failed to employ the distribution methods of which petitioner complains in this proceeding, while 85 per cent of the candy manufacturers engaged in the sale of candies through the use of the same methods that the petitioner is seeking to compel respondent to abandon through the instant proceeding. Since the testimony was taken in 1930 the number of members using these sales methods has grown to 425 or approximately 95 per cent. Further, five out of the eight manufacturers who supported the Commission in its complaint against respondent have resumed the sale of "break and take" merchandise, and of the remaining three, two manufacture a product not adapted to this sales plan.

These methods have been recognized factors in the distribution of the so-called "penny goods" candy for many years. There can obviously be no unfair competition, therefore, between the respective manufacturers constituting the majority in the business but merely between the great majority and the small minority of such manufacturers. As a practical matter, therefore, there can not be any substantial issue at stake, and indeed a number of those not using the methods here involved when the testimony was taken, testified they did not because their product was not suited to such methods (R. 101, 270). Clearly, therefore, the manufacturers of those products are not in competition with respondent and with the great majority of the candy manufacturers of the nation.

Thus also there is no unfairness in these methods, which are equally used by the great majority of the candy manufacturers of the country. On the contrary, the proof shows that the demand in the trade for the goods in question comes

from the smaller dealers and enables them to retain a part of their trade against the disastrous competition of the chain stores. The draw pieces or prize assortments which are here involved are the life blood of the small independent candy stores. To withdraw these pieces from their shelves, would result in forcing many of these small merchants out of business. The trade which they now command would revert to the larger retailers or chain stores and concentrate in a relatively few hands the bulk of the penny candy trade (R. 68). Thus the Commission's order would directly tend to produce that condition of monopoly which the Congress sought to prevent.

The official publications of the Department of Commerce of the United States corroborate the fact that the chain stores are the largest single factor in the "straight" candy trade (R. 68). Its Fourth Annual Report on "Confectionery Distribution in the United States" shows the following for the period 1929-1930 (pp. 12-13):

> Table 22 shows a continuing upward trend in sales to chain stores; such sales having increased from 13.3 per cent of the total in 1929 to 16 per cent in 1930. The number of manufacturers using this type of outlet increased from 259 in 1929 to 274 in 1930, this latter figure representing 53 per cent of the total number of firms reporting.
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> * * * * * *
>
> Sales to jobbers, which remained at 53 per cent of total sales from 1927 to 1929, showed an increase in 1930, directly proportionate to the increased sales to chain stores. *Sales to independent retailers, on the other hand, showed a sharp drop in 1930 compared with 1929,* * * *. (Italics ours.)

In the same Department's report for the period 1930-1931 it appears (p. 14):

> Sales to chain stores, which increased from 13.3 per cent of total sales in 1929 to 16.0 per cent in 1930, continued their upward trend in 1931. The present re-

port shows that during that year 18.0 per cent of all confectionery reported was sold to chain stores. Ten additional manufacturers report sales to this type of customer in 1931. Sales to independent retailers, shown to have been 19.6 per cent of the total in 1930, amounted to 18.5 per cent in 1931. * * *

The courts take judicial notice of such reports of a department of the Government issued in the course of official business.

Jones v. United States, 137 U. S. 202, 214-5.
Heath v. Wallace, 138 U. S. 573, 584.
Caha v. United States, 152 U. S. 211.
Thornton v. United States, 271 U. S. 414, 420.

In this case the Commission is unjustifiably attempting to expand its jurisdiction beyond any reasonable relationship to the purpose and language of the Act of its creation.

Since there was not even a charge of monopoly or deception, the Commission takes the extreme position, as it must upon the facts, that it has jurisdiction merely because of the alleged illegality of, or contravention of public policy by, respondent's sales policy. The Commission stands or falls upon the soundness of the proposition but reference to the careful safeguards with which the Court in the *Gratz* and later cases has surrounded its definition of the term "unfair method of competition" is all that is necessary to show that this position of the Commission is basically false. As held by this court in the *Raladam* case (page 651), it is impossible to conclude "that Congress intended to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors * * *".

It is apposite too to recall that public policy, no matter how clear, can not supply jurisdiction in this case. See *Fullinwider v. Southern Pacific Co.,* 248 U. S. 409, 412, where it was said "we may grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it can not be a substitute for a law".

Since the practices here involved are not unfair methods of competition in commerce as that language in the Act has been construed, nor does there exist a substantial and specific public interest, it is unnecessary to inquire whether any other agency of the Federal or state government might have cause to inquire into their legality. It is enough to note that the business methods involved are not within the purview of the Federal Trade Commission Act. The Commission has no jurisdiction to enforce any other law.

Comments on Petitioner's Application for Certiorari.

In the petition for certiorari statistics are cited to show the size of industries, including the candy industry, the grocery industry, the petroleum industry, the ice cream industry, and others, which have gone on record in conventions or through trade practice conferences against the use of lotteries in the sale of their products. Aside from the very questionable value of such data, as will be pointed out, counsel submit this court should not consider any of such new matter. Petitioner took months to prepare its case against respondent and then took testimony in six cities. Despite the ample opportunity thus presented none of this new matter was felt of sufficient importance to be offered in evidence. Nor has there been proper identification of these resolutions by responsible officers of the respective associations with opportunity of cross-examination by counsel for respondent. Counsel submits it comes too late to proffer new evidence for the first time in a petition for certiorari to this Court.

Respondent has been able in the main to verify the statistics cited except in the vital respect that 50 per cent of candy penny goods and bars are sold by means of lottery packages, as asserted on page 13 of the application for certiorari. The Bureau of Foreign and Domestic Commerce, from which the figures on penny goods and bars were obtained, expressly disclaimed to counsel for respondent on

investigation any responsibility for the estimate of 50 per cent. Those officials stated that no record on the relative volume of lottery packages existed in that Bureau or anywhere else, and that after an investigation on the subject they had concluded any estimate would be futile. Hence the estimate of the Commission is based on supposition only, and its accuracy is subject to the gravest doubt which completely destroys the value of petitioner's argument. Further in respect of the resolutions adopted by the various trade associations against the use of prizes in connection with the distribution of their products, it is apparent that the resolution adopted by the National Confectioners Association in 1923, quoted on page 38 of the petition, is the only one really applicable to this case. It is therefore of vital importance that the Association, at a convention held in Chicago on June 19-23, 1933, in effect rescinded the 1923 resolution, when it declined by a large vote to adopt a section of a proposed new code of ethics declaring that practices like those here involved constituted unfair methods of competition. It is fair to assume that the resolutions of the other industries referred to, adopted some years ago and under different conditions than those now prevailing, no longer represent the view of many of those interested.

Furthermore, petitioner seeks to inject into this case the subject of punch boards, which are not employed by the respondents, and which present a different question. When sales attributable to this method of merchandising are eliminated from consideration, the volume of trade affected by this case is reduced greatly below the figures cited by petitioner.

With respect to the case of *A. S. Douglis & Company*, Commission Docket No. 1862, referred to by petitioners on page 14 of their petition, suffice it to say that counsel for the manufacturer amply demonstrated that the Commission has no jurisdiction over the use of punch boards because the admitted facts disclosed no "unfair method of

competition" under Section 5 of the Federal Trade Commission Act as construed by this court, nor any "public interest". Nevertheless, the Commission unjustifiedly swept aside this showing, just as in the instant case, and issued its order to cease and desist. Counsel for respondents are confident that, also just as in the instant case, the Commission's order to cease and desist in the *Douglis* case will be set aside by the courts.

In Point II of the petition, it is averred under (a) that the fact that competitors are free to follow the same sales method is no defense. It is noteworthy that the only decision cited in support of this proposition is that of this court in *Federal Trade Commission v. Winsted Hosiery Company,* 258 U. S. 483, which was a case involving the use of deceptive labels. Hence the *Winsted* case is clearly an instance of a practice "opposed to good morals because characterized by deception, bad faith, fraud or oppression", as that language was used by this court in *Commission v. Gratz, supra.* The doctrine of the *Winsted* case can not be extended, as petitioner seeks to do here, to cover a situation where there is not even an allegation of deception but, as shown by the record (pp. 70-71), an express disclaimer of any charge of deception or false advertising or any intention to deceive the public or the consumer. The quotation from the *Winsted* case on pages 17 and 18 of the application for certiorari clearly shows the limitations of that decision and its inapplicability to this case.

Further, under Point II(b) it is asserted in the petition that the methods of competition here presented are against public policy, and in support of this proposition it is urged that the decision of the Circuit Court of Appeals is in conflict with the decisions of this court in the *Gratz* and *Raladam Company* cases, *supra.* Just wherein the conflict lies is not pointed out, but is left to surmise. In both of these cases the desist orders of petitioner were set aside and it is therefore difficult to see wherein they strengthen petitioner's case. Clearly this unsupported statement of pe-

titioner merits no consideration at the hands of this court. In any event the showing heretofore made amply refutes the contention.

Specifically, all methods of competition tend to reduce the business of competitors, and if successful may effect material decreases in competitive sales. But as this court has repeatedly held in the *Gratz* and later cases, a method of competition is against public policy only where there has been a dangerous tendency unduly to "hinder competition or create monopoly", and it will be remembered that not even a charge of monopoly was made in the complaint of the Commission in this case. Indeed, as pointed out above, the record (p. 324) shows that 85 per cent of the members of the National Confectioners Association employed the sales method complained of when the testimony was taken in this case, and the percentage is now approximately 95 per cent. So surely there is here no tendency to hinder competition or to create monopoly.

In Point III it is urged that the decision of the court below was in conflict with the decision of other Circuit Courts of Appeal. Cases are cited to show that it is no defense to prove that respondent's competitors have practiced the same illegal sales methods. But those cases had to do with situations of deception and bad faith, attempts to control prices through resale maintenance plans or coercion of manufacturers through threats of refusal to deal and similar situations, none of which situations is involved in the instant case.

For instance, the case of *Royal Baking Powder Company v. Federal Trade Commission,* 281 Fed. 744, involved misleading advertising of cream of tartar baking powder, which tended to and did deceive the public and was unfair to competitors; the case of *Butterick Company v. Federal Trade Commission,* 4 Fed. (2d) 910, involved resale price maintenance in violation of the Clayton Act and the Federal Trade Commission Act; the case of *Chamber of Com-*

merce of Minneapolis v. Federal Trade Commission, 13 Fed. (2d) 673, involved false propaganda and misleading publications and statements, as well as conspiracy to boycott another business exchange—all of which hindered competition in violation of the Federal Trade Commission Act; the case of *Hills Brothers Co. v. Federal Trade Commission,* 9 Fed. (2d) 481, as heretofore shown, was one of refusal to sell to dealers who failed to adhere to a resale price maintenance plan. The last case mentioned by petitioner under this heading, *Farmers Live Stock Commission Company v. United States,* 54 Fed. (2d) 375, arose under the differing provisions of the Packers and Stock Yards Act, 42 Stats. 159, and involved charges of unfair and discriminatory practices in an illegal boycott of certain live stock market agencies.

The line of demarcation between these cases and the instant case is so distinct that petitioner betrays the weakness of its case by their citation. In urging these cases in support of the proposition stated, petitioner missed the point completely. Where there is an evident method of unfair competition such as each of these cases involved, it is of course no defense that competitors are free to engage in the same practice. But where the gravamen of the action is unfair competition based on practices contrary to public policy, because of their tendency to hinder competition or create a monopoly, it is of the very essence to show that monopoly can not in the nature of things exist because no attempt is made to prevent competitors from using the same sales methods.

This analysis of petitioner's argument shows how palpably strained is the contention that the Commission has jurisdiction over the sales practice involved. Petitioner has resorted both before the Circuit Court of Appeals and in its petition to this court, to unjustified applications of the doctrine of cases which are not pertinent, and to distorted construction of decisions on entirely different questions and with entirely different facts; and finally under

this point of the brief is driven to rely on isolated expressions from these inapplicable decisions. It is axiomatic that sentences can not be torn from their context to support an argument on an unrelated situation.

Thus, in summary, the petition presents merely (a) the importance of the case and (b) the doctrine of the *Winsted* and similar cases, in support of the application for the writ. The latter is inapplicable and the former no basis for favorable action by this court, in the absence of an affirmative showing of jurisdiction. Mere importance, no matter how great, can not change the scope of the organic act and enlarge the functions of the Commission which this court has repeatedly recognized to be one of "strictly limited" jurisdiction. *Federal Trade Commission v. Klesner,* 280 U. S. 19, 27.

CONCLUSION.

The instant case involves only the application of well-settled principles to the peculiar facts of a particular situation. It presents no conflict of decisions. The petition should be denied.

Respectfully submitted,

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July, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 194.

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

R. F. KEPPEL & BRO., INC., *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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v.

R. F. KEPPEL & BRO., INC., *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Court below—the Circuit Court of Appeals for the Third Circuit—(R. 371) is reported in 63 Fed. (2d) 81.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered January 25, 1933 (R. 383). The

petition for certiorari, under extension of sixty days duly obtained from a Justice of this Court, was filed June 21, 1933, and was granted October 9, 1933 (R. 386). The jurisdiction of this Court arises under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, 719; U. S. C. Title 15, Sec. 45).

THE QUESTION.

The question presented concerns the jurisdiction of the Federal Trade Commission to make the cease and desist order in this case. The Court below ruled that the Commission was without such jurisdiction and reversed the order (R. 376).

More particularly, the question is as to the power of the Commission to require that the respondent, R. F. Keppel & Bro., Inc., shall cease and desist from the sale and distribution to wholesale dealers and jobbers in interstate commerce of packages or assortments of candy in which (a) were contained larger pieces of candy or articles of merchandise to be given as prizes, dependent upon the color of the centers of said candies; or (b) assortments in which slips of paper were contained in each wrapper upon which were printed varying prices to be paid for said candy or that it was free; and (c) assortments containing a number of pieces in which a sum of money was concealed; with which assortments of candy respondent furnished display cards, truthfully describing the sales plan being used.

A further question concerns the jurisdiction of the Commission, by its order, to prohibit the "packing and assembling" of assortments described in (a) and (b)—purely intrastate operations of "manufacture" and not "commerce"; but an affirmance of the decision of the court below will render it unnecessary to pass thereon.

THE STATUTE.

Section 5 of the Federal Trade Commission Act (38 Stat. 717, 719) is printed substantially in full in the appendix of the Commission's brief (pp. 43-6). Respondent accordingly sets forth here but the immediately relevant language of that section on which it feels this case turns:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, * * * a complaint * * *.

STATEMENT.

The facts that the Commission sets forth in its brief appear to respondent to be incomplete and it therefore respectfully submits the following supplementary statement.

It is particularly significant to note that the complaint of the Commission makes no charge of deception or fraud, nor is there any charge of monopoly. On the contrary, counsel for the Commission during the trial of this case expressly disclaimed any attempt to charge respondent with "a false misleading or untrue statement" (R. 70), "any intention to deceive the public or the consumer" (R. 71), and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case".

Nor does the complaint in this case charge "undue restraint of trade". There has been no charge in this case that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which to them seems desirable, or any restriction upon the right of the jobbers who dispose of respondent's candies to handle

those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. Respondent has never refused to sell its goods because of the failure of the retailer to sell the "break and take" candies (R. 76).

There is no more advantage to respondent in selling the so-called "break and take" assortments here involved than other type of candy handled by respondent (R. 72) *i. e.* the scale of profit on "break and take" and "straight goods" is the same (R. 72), and it is not disputed that respondent's entire box, *i. e.* the candy and the prizes, contains as much value as any box of "straight goods" (R. 72).

This proceeding was very largely instigated by the National Confectioners Association, which had endeavored as early as 1927 to stop the "break and take" packages (R. 151, 81). At least two of the manufacturers who testified were members and former officers of that Association (R. 150,287). Another testified that three officers of his company had held office in the Association (R. 247). In addition, two testified they were members of and represented on the list of officials of the New England Confectioners Association (R. 287-8, 325). One of the manufacturers, Voneiff, who testified in person that he was a member of the national association and an ex-officer, was the same individual whose company furnished four out of the five salesman witnesses before the Commission (R. 162, 171, 210 and 217). Respondent withdrew from this Association as it was trying to put respondent out of business (R. 82) and the business from this package "puts us in the profit column instead of the loss" (R. 87). A number of other manufacturers resigned at the same time, and for the same reason (R. 88-9).

Of the 450 members of the National Confectioners Association, 380 or 85 per cent manufacture "break and take" candies. Of the 15 per cent who do not manufacture "break and take" assortments, some do not because it was not suited to their type of merchandise (R. 101) or because they specialize in licorice which has never been made the subject of such an assortment (R. 270).

In its review of the evidence, the Commission on page 4, points out that 60 per cent of respondent's business consists of the "break and take" assortments but it fails to point out why this is so. From pages 67 and 68 of the Record, it appears that respondent has made a "drive on that particular type of package" because while there is more straight merchandise sold than "break and take" packages throughout the United States

> * * * certain channels have practically a monopoly on straight merchandise.
>
> As an illustration, your chain stores sell today three five-cent bars for five cents. That leaves the little merchant, the independent man, high and dry. He cannot compete, because the chain stores buy merchandise at exactly the same figure as the wholesaler can. So that leaves this type of merchandise for the little fellow to eke out his existence on. (R. 68)

Thus it appears the small merchant consumes most of the break packages and would be the most injured if the Commission's order were affirmed, because the "Five and Ten Cent Stores have a monopoly on bulk candy while chain stores have a monopoly on 5c bars which leaves the little man with the penny goods, the individual man" (R. 68).

From the testimony of the Commission's chief witness, Voneiff, it appears that his company is one of those selling to the "chain stores, and syndicate stores, syndicate drug companies" (R. 122) which handle only staple or straight goods (R. 153) and while his company makes "break and take" packages, this represented only about 5 per cent to 8 per cent of its business in 1930 (R. 141). This witness also makes a great quantity of straight goods for which he has a chain store outlet. Two other witnesses, making a total of three, also sold to chain stores (R. 257 and 271).

On this testimony the Trial Examiner found, as shown by his Paragraph VII (R. 340):

> The demand in the trade for the "Break and Take" goods comes from the smaller dealers. The chain stores and other large retailers, such as the five and ten-cent stores, sell large quantities of straight goods at prices which the small retail dealer cannot meet, therefore, he turns to "Break and Take" goods in order to draw trade to his store (R. pp. 50, 70).

The Commission alleges (p. 12) that nine "representatives of competitors of respondent," testified that their business was adversely affected by sales of "break and take" candies, but this is a most unfair and glaringly erroneous statement. For example, from the first of these witnesses respondent finds no testimony that his company was in competition with respondent but solely that "any candy manufacturer is a competitor when they make the same type of merchandise" (R. 98), and this is all he means when he later says his company has "lots of competitors" making these products—"competitors in a general way. One competitor in candy is a competitor with another one" (R. 98). Indeed, this witness' only business connection with the respondent has consisted in the sale of merchandise to respondent over a period of years (R. 106). The second manufacturer to appear—the witness Voneiff mentioned above—testified (R. 120-162) at length upon the experience of his company and his impressions of the influence of "break and take" packages upon the industry as a whole, but not one word appears in his testimony to link his company with *respondent,* and *its* business practices. Examination of the testimony of seven other manufacturers' representatives called by the Commission reveals almost exactly the same situation. One is typical of the rest, when he says (R. 265) "any candy item itself which sells for a penny I consider in competition with our product".

Only one manufacturer testified directly that his product was in competition with respondent's candy, and he did so only in most general terms. Surely this is not evi-

dence of that substantial competition required by the statute.

Of the five salesmen and jobbers who testified, four were employed by the Voneiff-Drayer Company (R. 162, 171, 210 and 217) which in 1930 sold 92 to 95 per cent of its product to the chain stores. Furthermore, it was not shown that the last two witnesses, small store keepers, ever dealt in respondent's candies (R. 112-3 and 117).

Thus, we have here merely evidence that respondent makes such packages and sells them in interstate commerce. The testimony after that is all as to the trade generally, which does not lay a foundation for a cease and desist order against an individual manufacturer. Respondent moved opportunely to strike all such evidence (R. 195-8), which motion was denied notwithstanding the Examiner expressed his view that such evidence was immaterial on the issue of unfair competition as it affected respondent—the sole issue in the case (R. 198).

Practically the only direct and uncontradicted testimony as to respondent is that given by the Commission's witness, one P. M. Smith, who states (R. 106) in answer to the question "Have you ever had any connection or business relations of any kind with this respondent?" said that "I have sold them merchandise for years in their jobbing department and we were very happy in every way. Mr. Keppel is a personal friend"; and on page 294 where another witness testifies "We have had dealings with Keppel and found them always to be upright and very friendly".

Thus the Commission was not justified in including in its Finding Nine a statement that the use of *respondent's* sales methods is prejudicial and injurious to the public and to competitors. This Finding, which is a conclusion rather than a purely factual statement, represents a decided change in the views of the trial Examiner who heard the testimony in this case, and who stated in Paragraph IX of his report that (Italics ours):

There is no evidence in the record that any competitor of the respondent has been injured in his business by reason of the "Break and Take" product manufactured and distributed by respondent, other than that which shows that the business of all candy manufacturers who make only "Straight Goods" is injured by all "Break and Take" goods on the market.

In addition to lack of evidence of substantial competition, the testimony concerning the existence of any adverse effect of the prize assortments on the sales of other manufacturers, even though not competing with this respondent, was not unanimous. For example, one witness stated that the loss of business (incidentally, during depression years) was due partly to other reasons (R. 306), and another that such loss was partly owing to his company's failure to nationally advertise its product (R. 282). The testimony of still another witness was not as to the sales of his company but generally on the decrease of all penny goods sold by the industry (R. 249), and even as to this, his testimony was "more or less an estimate, *a guess and a wild guess,* that is all. I do not think that anybody could guess accurately on it." (R. 248.) When pressed by Commission counsel to testify to a decrease in his company's sales due to prize assortments, this witness stated that he could not "prove it" (R. 253). The testimony of another was merely an opinion and was stated to be so (R. 261) and was hence worthless. One of the manufacturers called as a witness for the Commission testified that his company had always made a fair return on its investment (R. 238). A salesman called as a witness testified that he lost no customers when he did not have the "break and take" package to offer (R. 220) and that he did not see there was any greater demand on the part of children for "break and take" candy than for "straight goods" (R. 222-3). From another salesman it appears the practice is old, for he testified that he remembered buying such assortments as a very small child

(R. 217). One of the Commission's witnesses testified that in his opinion the practice was legal (R. 207).

The witness referred to by the Commission (p. 13) who testified that his penny goods business had been cut as much as 50 per cent by "break and take" packages and that he had lost customers because he did not sell this merchandise, also testified that he was not familiar with respondent's assortments because they were not seen in Boston, where his business was located (R. 294).

One storekeeper testified before the Commission (R. 113) that he did not handle "break and takes" and when questioned whether his failure to sell that type of package lost him any sales stated "Well, perhaps just for a while, but then they forgot all about it and bought other candy." (R. 115.)

The Commission invites attention to a number of findings but it is significant that it fails to invite attention to Paragraph Eight (R. 18) reading in part "All sales made by respondent, whether to wholesalers and jobbers, or to retail dealers, are absolute sales, and respondent retains no control in any manner over the goods after their delivery to the wholesale dealer or jobber, or retail dealer."

SUMMARY OF ARGUMENT.

Under Section 5 of the Federal Trade Commission Act three conditions must exist simultaneously before a cease and desist order is justified; First, that there be present methods of competition in commerce, secondly, that such methods are "unfair", and thirdly, that a proceeding by the Commission in respect of that practice would be to the interest of the public. The absence of any one of these elements is fatal to the Commission's cause.

Respondent submits that the Commission has failed to satisfactorily prove the existence of any one of these prerequisites to jurisdiction.

1. Adverting first to the requirement that the methods be

"unfair," the message of President Wilson recommending the enactment of, and the reports of the Committees of Congress in charge of, the Federal Trade Commission Act disclose that law was aimed primarily at those practices tending to restrain trade or create monopoly. The Act must be interpreted in the light of this purpose. The Courts have so recognized in numerous cases including *Federal Trade Commission v. Raladam Company*, 283 U. S. 643; *Federal Trade Commission v. Gratz*, 253 U. S. 421, 433-6; *L. B. Silver Company v. Federal Trade Commission*, 289 Fed., 985, and *Northam Warren Corporation v. Commission*, 59 Fed. (2d) 196.

Accordingly, the Courts have sustained the Commission in ordering discontinuance of practices which clearly tended to restrain trade or to create monopoly, such as the practices of resale price maintenance, *Butterick Company v. Federal Trade Commission*, 4 Fed. (2d) 910; false propaganda and conspiracy to boycott, *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 Fed. (2d) 673; refusal to sell to dealers failing to adhere to a resale price maintenance plan, *Hills Bros. Company v. Federal Trade Commission*, 9 Fed. (2d) 481, and others of like nature.

The only other concept comprehended under the doctrine of unfair competition involves deception, or as this court stated in *Federal Trade Commission v. Gratz, supra*, "deception, bad faith, fraud or oppression." A typical instance of the application of this principle is the case of *Royal Baking Powder Company v. Federal Trade Commission*, 281 Fed. 744, involving misleading advertising of cream of tartar baking powder. But this doctrine is not to be stretched to cover practices which might be deemed at most merely unethical or disapproved, and do not constitute deception, for as stated in *Northam Warren Corporation v. Commission, supra*, "where unlawful restraint of trade has been ordered to be discontinued it has always appeared that

there was some dishonesty in labeling or marketing the goods."

The Commission in this case neither charged in its complaint, nor proved, practices which constituted attempts to create monopoly within the interpretation assigned to that phrase by the courts nor did it charge and prove any "deception". Indeed, the Commission expressly disclaimed "any intention to deceive the public or the consumer" (R. 71).

The public is not deceived regarding the merchandise to be sold by petitioners nor the plan under which it is offered. Advertising matter or display cards explaining the method in detail is furnished with each assortment and it has been held by the court below and not heretofore contested that such cards are in all respects fair and true. Public policy is not involved because there is no charge of any "dangerous tendency" unduly to hinder competition or create monopoly. Thus we clearly have here no deception, bad faith, fraud or oppression or any dangerous tendency to create a monopoly.

2. In respect of the requirement of public interest, this Court has established that a general public interest will not suffice, but the public interest which meets the terms of the Federal Trade Commission Act must be based directly on the same tendency to create monopoly or the same deception, which meets the requirement of "unfairness". In *Federal Trade Commission v. Raladam Company, supra,* Mr. Justice Sutherland, in speaking for the Court, said that in order to support an order of the Commission the methods must tend to the substantial injury of the public "by restricting competition in interstate trade and 'the common liberty to engage therein' ". Again, in *Berkey & Gay Furniture Company v. Federal Trade Commission,* 42 Fed. (2d) 427, the court, following the *Gratz* case, held there must be some practice "characterized as deception, fraud or even unfairness" and that injury to the public interest is "*thereby*" shown; and as the court held in *Northam*

Warren Corporation v. Federal Trade Commission, supra (p. 198) (italics ours):

> * * * In order that the Commission proceed in the public interest, the Courts have insisted not only upon a showing that the practice is unfair and disapproved, *but also that the public are misled thereby, Federal Trade Commission v. Klesner, supra.*

Hence the requirement of public interest is indissolubly linked with the deception or tendency to create monopoly which meets the requirement of unfairness, and thus if there is no unfairness there is not that type of public interest to which the statute refers. Furthermore, the public interest must be "specific and substantial", *Federal Trade Commission v. Klesner,* 280 U. S. 19, 28, and merely isolated instances of possible or potential injury will not suffice.

It is to the interest of the public that the "break and take" assortments be continued, for through them the small independent candy merchant and store keeper can continue in business, despite the competition of chain stores, which have a virtual monopoly on "straight" candy sales because of their trade advantages. The affirmance of the order of the Commission would concentrate the greater part of the penny candy trade in the hands of these large chain stores, which are interested in eliminating the competition of respondent and other manufacturers of "break and take" assortments. The Commission's order would tend to produce monopoly rather than eliminate it.

3. Upon the requirement that the methods be methods of "competition" in commerce, this Court, in *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, held insufficient testimony from physicians, one an officer of the American Medical Association, supplemented by a list of the other manufacturers of anti-fat remedies and obesity cures, with some very vague testimony of the purchase of several such remedies on the market. Direct testimony as to the Raladam Company's competitive situation was

missing, but in lieu thereof the record was full of medical testimony on the general harmful character of nearly all such remedies. No competitor was called to testify and no customer.

Hardly more adequate proof is presented here. The record is replete with general testimony relating to the entire candy industry, and the effect of "break and take" assortments on the trade as a whole. But the Commission produced no witness who identified himself as a consumer of respondent's package, or even as the parent of a consumer of respondent's package. Again, only one witness testified to direct competition from respondent's candy, and he was contradicted by another manufacturer from the same city who said respondent's product did not reach there. These facts are strikingly akin to those held inadequate in the Raladam case, and present, we submit, an all too meager basis on which to conclude that a showing of the existence of substantial "competition" has been made, sufficient to warrant the destruction of respondent's manufacturing business. Is there here an adequate basis upon which to conclude that there exists that injury to competitors, which is, as shown, indispensable to an "unfair method of competition in commerce"? More particularly, can it be said that the showing of injury to competitors is "*specific* and *substantial*", within the doctrine of *Federal Trade Commission v. Klesner*, 280 U. S. 19. Rather there is here merely a showing of a general policy on the part of the National Confectioners Association to stop this practice, and (the inference is certainly justified by the record) that policy was adopted at the instigation of the chain stores, valuable customers of the manufacturers, members and officers of the Association who testified in this case, which desires to eliminate the competition from the independent candy stores.

Since no unfair methods of competition are shown and no substantial and specific public interest, the Federal

Trade Commission is without jurisdiction. Accordingly, if there is anything in respondent's sales plan in contravention of the anti-lottery laws of the United States or of the several states that is a matter for some other agency of those governments and not for the Federal Trade Commission. The brief of the Federal Trade Commission in footnote (p. 32), states "No claim is made that respondent violated the federal lottery statutes."

4. Irrespective of what the decision of this court may be on those paragraphs of the Commission's order which relate to the selling and distribution of respondent's candy assortments, with their appropriate display cards, in interstate commerce, it is clear that the Commission went too far in paragraphs 4 and 5 of the order (R. 26-27) in attempting to prohibit respondent from "packing and assembling" its merchandise in any manner which its business judgment dictates. This is purely a "manufacturing" operation under the doctrine established in *Utah-Idaho Sugar Co. v. Commission*, 22 Fed. (2d) 122, upon the basis of the decision of this Court in *Kidd v. Pearson*, 128 U. S. 1, as distinguished from "commerce" which when interstate in character is subject to control by Congress. These paragraphs should be stricken from the order of the Commission in any event.

ARGUMENT.

I. The Complaint of the Federal Trade Commission Failed to Aver Nor Did the Evidence Prove that the Business Methods of Respondent Were "Unfair" Methods of Competition in Commerce.

(a) *The Judicially Established Meaning of the Term "Unfair."*

What constitutes "unfair" methods of competition in commerce was considered by this Court in the case of *Federal Trade Commission v. Gratz, supra,* where the practice complained of was the refusal of respondents to sell steel ties for binding bales of cotton unless the prospective purchaser would also buy the jute bagging used to wrap the cotton, and defined as follows (pp. 427, 428):

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. * * *

This definition has been approved in all the later cases. See for example, *Federal Trade Commission v. Beech-Nut Company,* 257 U. S. 441, 453, and *Federal Trade Commission v. Raymond Company,* 263 U. S. 565, 572.

Thus we have a definition with two branches, viz., practices opposed to good morals and practices against public policy, but each branch contains specific limitations which may not be ignored. It is not sufficient that practices be merely opposed to good morals nor that they be merely against public policy, as the Commission claims in its attempt to broaden its jurisdiction beyond the prior decisions

on the subject. It is not enough to take either of the broad expressions "good morals" and "public policy" without the limitations thereon indicated and carefully applied by this Court. Instead the breach of good morals must arise from "deception, bad faith, fraud or oppression"; and the breach of public policy must arise "because of the dangerous tendency unduly to hinder competition or create monopoly." So far as has been discovered no court has broadened the definition of unfair competition so as to include any case which would not fall within one or the other of these two classes.

Respondent now proposes to discuss briefly the accepted meaning of the concepts of "monopoly" and "deception" (using this latter term broadly to cover the expression "deception, bad faith, fraud or oppression" in the Gratz opinion), under the Federal Trade Commission Act, as established by the decided cases, and to show that the methods assailed in this proceeding do not fall within their scope.

"Monopoly", *i. e.*, practices which tend to restrain trade or create monopoly within the Act, involve resale price maintenance plans, coercion of manufacturers by jobbers through threats of refusal to deal, and similar situations. *Hills Bros. Co. v. Commission*, 9 Fed. (2d) 481; *Cream of Wheat Co. v. Commission*, 14 Fed. (2d) 40; and *Southern Hardware Jobbers' Association v. Commission*, 290 Fed. 773. But in *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463, this Court held that the furnishing by oil refiners to dealers of pumps for nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition because of the absence of any tendency to hinder competition. On the contrary, as here, competition was promoted as many small stores were thus enabled to handle gasoline. Indeed, all restraints or diversions of trade do not constitute monopolies of the character which constitute unfair methods of competition. *Sinclair Re-*

fining Company, supra; Federal Trade Commission v. Raymond Company, supra.

An example of the type of business practice which results in loss of business to competitors, but is not "unfair" under the Act occurred in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568. There it was held that a method of merchandising magazines through exclusive agents was not an unfair method of competition, *even though many of the distributors had previously been general distributors disposing of magazines of other publishers, but under their new arrangement with the petitioner were compelled to cease representation of others.* As was said on page 582:

> Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.

The concept of "deception" has likewise been before the courts in numerous cases. An example of the deceptive practice which the Federal Trade Commission Act was designed to stop is *Federal Trade Commission v. Winsted Company*, 258 U. S. 483, where certain labels which "were false and calculated *to deceive*, and did in fact *deceive*, a substantial portion of the purchasing public" were held by the Commission to be unfair, and an order to cease and desist was sustained by the courts. In footnote below[1] are listed numerous cases where orders of the Commission were vacated by the courts because there was no *misrepresentation or deception* of the public.

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[1] *Northam Warren Corporation v. Commission*, 59 Fed. (2d) 196 (Second Circuit); *Indiana Quartered Oak Company v. Commission*, 58 Fed. (2d) 182 (Second Circuit) modifying 26 Fed. (2d) 340; *Arnold Stone, Inc., v. Commission*, 49 Fed. (2d) 1017 (Fifth Circuit); *Ohio Leather Co. v. Commission*, 45 Fed. (2d) 39 (Sixth Circuit); *The Philip Carey Mfg. Co. and The Philip Carey Co. v. Commission*, 29 Fed. (2d) 49 (Sixth Circuit); *Mennen Company v. Federal Trade Commission*, 288 Fed. 774.

Conversely, in the cases listed in a second footnote below,[2] because there existed *deception or misrepresentation* which was "unfair" because it diverted or tended to divert trade from competitors, the orders of the Commission were affirmed.

The tenor of the cases is shown by a few brief comments:

The use of the term "Duraleather" as a trade name to denote an imitation product containing no leather was enjoined by the Commission, whose order was upheld by the Circuit Court of Appeals for the Third Circuit in *Masland Duraleather Co. and W. & J. Sloane v. Commission, supra,* because of its tendency to mislead the public. As said on page 737, "A false trade name or one that has both the capacity and tendency to *deceive* the ordinary purchaser will be enjoined", citing numerous cases.

There was *misrepresentation* in the case of *Commission v. Kay, supra,* where respondent labeled his product as radium, it containing no true radium. A holding to the same effect was made in *Commission v. Bradley, supra,* in connection with the use of the word "English" in labeling a soap not made in England.

Again, in the case of *N. Fluegelman & Co., Inc. v. Federal Trade Commission,* 37 Fed. (2d) 59 (Second Circuit), the order of the Commission was modified because the trade-names "Satinmaid" and "Satinized", under which petitioner sold its product were partially justified by the use of a satin weave, and the court permitted the continued use of these trade-names upon the inclusion in the adver-

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[2] *Federal Trade Commission v. Royal Milling Company,* 288 U. S. 212; *Commission v. Good Grape Co.,* 45 Fed. (2d) 70 (Sixth Circuit); *Federal Trade Commission v. Kay,* 35 Fed. (2d) 160-2 (Seventh Circuit). Certiorari denied 281 U. S. 764; *Lighthouse Rug Co. v. Commission,* 35 Fed. (2d) 163 (Seventh Circuit); *Masland Duraleather Co. and W. & J. Sloane v. Commission,* 34 Fed. (2d) 733 (Third Circuit); *Commission v. Bradley,* 31 Fed. (2d) 569 (Second Circuit); *Federal Trade Commission v. Balme,* 23 Fed. (2d) 615-9 (Second Circuit). Certiorari denied 277 U. S. 598; *Procter & Gamble Co. v. Federal Trade Commission,* 11 Fed. (2d) 47-8 (Sixth Circuit). Certiorari denied 273 U. S. 717-718; *American Tobacco Co. v. Federal Trade Commission,* 9 Fed. (2d) 570, 575 (Second Circuit). Affirmed 274 U. S. 543; *Guarantee Vet. Co. v. Federal Trade Commission,* 285 Fed. 853-60 (Second Circuit); *Royal Baking Powder Co. v. Federal Trade Commission,* 281 Fed. 744-52 (Second Circuit).

tising matter of expressions to indicate that the product was not silk but was cotton. As was said on page 61 (italics ours):

> * * * Thus the petitioner would describe its "Satinmaid" and "Satinized" as a cotton fabric with a satin weave, which, *if thus truly made and truthfully displayed and offered to the purchasing public, will not be deceptive.* An order which would forbid such merchandising prohibits that which is lawful, and the order to cease and desist entered upon such a basis can not stand. Fed. Trade Comm. v. Curtis Pub. Co., 260 U. S. 568, 43 S. Ct. 210, 67 L. Ed. 408; Heuser v. Fed. Trade Comm. (C. C. A.) 4 F. (2d) 632.

In the recent case of *Northam Warren Corporation v. Federal Trade Commission, supra,* the Circuit Court of Appeals for the Second Circuit held that the use of paid testimonials without disclosing that such testimonials were paid for was not a deceptive practice within the jurisdiction of the Commission. Respondent takes the liberty of quoting from that opinion the same matter as did the court below (R. 374-5), because of the compact statement of many important principles which are applicable, respondent believes, to the instant case (p. 198):

> The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade. Even if a practice may be regarded as unethical, it would still be beyond the purview of the act if it lacks the public interest necessary to support the Commission's jurisdiction. *Fed. Trade Comm. v. Klesner,* 280 U. S. 19. The Commission does not suggest that these testimonials tend to create a monopoly; they do not have a tendency to create an undue restraint of trade. The strongest argument the respondent makes is that failure to state the price paid for the testimonial

amounts to deception and misrepresentation concerning the petitioner's product and in that way the petitioner is able to deprive honest manufacturers of a market. *Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483. But where unlawful restraint of trade has been ordered to be discontinued it has always appeared that there was some dishonesty in labeling or marketing the goods. *Fed. Trade Comm. v. Winsted Hosiery Co., supra; Guarantee Veterinary Co. v. Fed. Trade Comm.*, 285 F. 853 (C. C. A. 2); *Royal Baking Powder Co. v. Fed. Trade Comm.*, 281 Fed. 744 (C. C. A. 2); *Procter & Gamble v. Fed. Trade Comm.*, 11 Fed. (2) 47 (C. C. A. 6). *In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby. Fed. Trade Comm. v. Klesner, supra.*

The use of testimonials, which are truthfully stated under the signature of the giver, cannot in any sense be regarded as unfair competition or as involving a tendency to restrain competition unduly, and the Commission was without jurisdiction to interfere. (Italics ours.)

Thus we have the gist of "unfair methods of competition" as defined by the decided cases, "deception", "misrepresentation", "bad faith", "oppression", or practices tending unduly to hinder competition or create monopoly. But the expression is, to revert again to the language of this court in the *Gratz* case, "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by" (p. 427) any of these elements.

(b) The Respondent's Methods Assailed Herein Are Not Unfair.

In the instant case there is no charge in the complaint that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which

to them seems desirable, or any restriction upon the right of the jobbers who dispose of respondent's candies to handle those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. There is no charge in this case that respondent refuses to sell to its customers unless they will agree to refrain from purchasing the candy of other manufacturers, or that respondent places any restriction on the manner in which they shall market the "break and take" packages themselves. Hence the situation before this Court in the case of *Sinclair Refining Company, supra,* might be said to go further in its tendency to create monopoly than that here involved, but the Court had no difficulty in finding that there was no unfair competition; *a fortiori,* there can be no such competition in the instant case.

Nor was there any allegation in the complaint in this case of deception, bad faith, fraud or oppression. On the contrary, during the trial counsel for the Commission expressly disclaimed any attempt to charge respondent with a "false, misleading or untrue statement" (R. 70) or with "any intention to deceive the public or the consumer" (R. 71); and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case."

This failure of the complaint to charge that respondent's sales plans are deceptive or tend to the creation of a monopoly, is in itself fatal to the Commission's case, for this Court held in the *Gratz* case, *supra,* that the Commission's order "should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court". Indeed, in comparison with the complaint in that case, set forth by this Court on pages 425-426 of its opinion, the complaint in the instant case, appearing at pages 2 to 6 of the record, shows no substantial difference. Each, after stating that the proceeding is brought under Section 5 of the Act, acting in the public interest, and charging un-

fair methods of competition, identifies the parties and specifies in detail the practices complained of. The complaint in the *Gratz* case then states that the acts specified "were committed with the purpose, intent and effect of discouraging and stifling competition in interstate commerce". In the instant case the complaint specifies that the practices "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce," etc. Just as there held, the complaint in this case, respondent submits, did not charge "unfair competition within the proper meaning of these words", and the order therefore is a nullity. Cf. *Philip Carey Manufacturing Company v. Commission,* 29 Fed. (2d) 49, where it was held a similarly deficient complaint could not be remedied on appeal.

Moreover, when the "Findings as to the Facts and Conclusion" of the Commission (R. 12-24), promulgated simultaneously with and as the basis of its order, are examined, no finding that the public or competitors have been deceived or that there is monopoly is found. The only statement even approaching the necessary basis for jurisdiction and the issuance of a valid order is contained in Paragraph 9 of the findings of fact, where despite the absence of any allegation of monopoly in the complaint it is alleged that the sales method of respondent is "prejudicial and injurious to the public and its competitors," and hence results in diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of trade and legitimate competition in the candy industry. In other words, it is averred that a diversion of trade *results from* "prejudice and injury to competitors" caused by the sales plan. Certainly a curious allegation, without any assertion of indispensable jurisdictional facts. This is all that the complaint or findings disclose under a statute which makes it mandatory for the Commission to allege and prove the use of methods which are deceptive and misleading or which tend to create a monopoly.

Clearly we have here a complaint, which like that before the Supreme Court in the case of *Commission v. Curtis Publishing Company, supra,* was merely "a vague general complaint charging unfair methods of competition * * *" (p. 580); and findings of a purely general character, which do not allege deception, bad faith, fraud or oppression or the existence of efforts to create a monopoly.

Aside from the insufficiency of the complaint, there was no evidence of "monopoly", for there is an utter absence in the record of any evidence of coercion, refusal to deal, and the like. There is positive evidence to the contrary. (R. 76) Further, while respondent's sales represent a certain percentage of the purchasing power of the public for this type of candies, it is likely the sales plan increases the candy trade as a whole rather than diminishes it. It is purely speculative to say that respondent's competitors would make larger sales if this plan were not followed. The present customers might turn to an entirely different type of merchandise or amusement.

In this case the small retailer is enabled to continue in business despite chain-store competition which has a virtual monopoly on straight goods. (R. 68) Surely this is not restraint of trade but promotion of competition.

Nor was there any evidence of "deception". Indeed, it is not disputed that an entire box of respondent's "break and take" candy contains as much value as any box of straight goods (R. 72) and that respondent makes no greater profit on one kind than the other. The objection is that the value is not distributed equally between the customers. But this is not deception or bad faith.

The record discloses that consumers of this penny goods know precisely by what method of retailing the candies are being disposed of and know the size of the candies they are purchasing; and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness; but on the contrary, as recognized by

the Circuit Court of Appeals, explicit information is available to the consumers in carefully prepared and truthful display cards. It is then clear that the candies are "truthfully displayed and offered to the purchasing public" as commented on in *Fluegelman & Co. v. Commission* (37 Fed. (2d) 59, 61) and hence are not "deceptive".

Respondent submits that the history of this legislation and the decided cases clearly show that the practice here complained of was not in the minds of Congress or intended to be reached by the act.

The candy industry has universally employed prizes in connection with the sale of penny candies over a long period of years, and no exception was taken to this practice as a perfectly legitimate trade instrument by the Federal Trade Commission until the year 1924. In other words, the Commission waited from 1914, when it was organized, until 1924—a period of ten years—before it conceived that business practices employed by 85 per cent of the members of the candy industry were unfair trade practices. A few complaints then issued, and nearly all early cases were won before the Commission by the candy manufacturers. Thereafter, the matter was dropped, until the year 1930 when the Commission began anew its campaign to extend the meaning of the statutory phrase "unfair methods of competition". This long delay amply demonstrates that this is a case falling within the language quoted above from the *Gratz* case, that the words "unfair methods of competition" obviously would not apply to "practices never heretofore regarded as opposed to good morals", et cetera. *On the contrary, this case simply boils down to an instance of a minority of the members of an industry who represent an insubstantial portion of the trade endeavoring to control through the medium of an agency of the Federal Government the actions of the majority.* (R. 96) This minority cleverly attempts to cloak their efforts to rid themselves of legitimate competition with a mantle of righteousness. They say they are protecting the children of the country

from the gambling instinct, and they rely on this to show "public interest" within the meaning of the law. But this effort of the minority candy manufacturers must fail, for a reading of the record enables an appraisement of this testimony at its true worth—nothing—for the motive in the end is *more profits.* Note for example the testimony of the chief witness called for the Commission, one Voneiff, who testified on pages 127-8 that he manufactured draw packages to meet competition rather than lose that volume of business despite the fact he was opposed to the plan in principle, and on page 160 that he had recently put out a punch board, in order to meet competition, although he expected, sooner or later, "to be picked up by the Government."

Respondent further submits with deference that this Court will not hestitate to disavow the declared purposes of the Commission in instituting any proceeding and issuing a cease and desist order. The courts can discern and declare the real purpose of any proceeding appearing from the record as distinguished from the purpose stated by the Commission. Thus, in *Federal Trade Commission v. Raladam Company, supra,* this Court refused to countenance an order of the Commission which would have benefitted medical practioners acting through the American Medical Association rather than any legitimate competitors in trade of the Raladam Company.

In this case, as the record clearly demonstrates, the moving force behind the complaint and the proceedings thereunder was the National Confectioners Association which a number of years ago adopted a policy against the "break and take" packages. Members and officers or former officers of that Association or their employees constituted the greater number of the witnesses at the hearing in this case and their testimony, for lack of any substantial connection with the respondent and its products, was directed at what the Association felt was the deleterious effect as a whole of the "break and take" packages on the "straight goods"

trade. Curiously enough, we find that three of the manufacturers who attended as witnesses, including one who arranged for the presence of four of his salesmen as witnesses, sold very substantial quantities of straight goods to chain stores and syndicated drug stores, who by buying in bulk are able to monopolize the straight goods trade. Obviously, these officers of the National Confectioners Association dictated the policies of that Association and obviously the Association is maintained for the benefit of its members. What greater benefit is there from a purely commercial point of view than profits? Thus, it is no unfair inference that the policies of the Association are dictated by its officers, who are officials of manufacturers selling largely to chain stores, and who desire the elimination of the prize assortments not handled by those stores, to increase the sales of straight goods by such stores and thereby the market for their own product.

Referring again to the Commission's principal witness who appeared with four of his sales representatives, and who himself declined to sign a stipulation to stop the manufacture of "break and take" packages, clearly all evidence emanating from his company must be disregarded since, as has been repeatedly pointed out by the Courts, those engaged in the same practices as the person against whom complaint is issued, are not entitled to the protection of the Federal Trade Commission Act, *Federal Trade Commission v. Raladam Company, supra*, p. 652.

(c) *Discussion of Opinion of Court Below.*

The court below adopted the meaning of the element of unfairness in the term "unfair methods of competition in commerce," repeatedly set out by this Court in its decisions as above shown, and held that there was no unfairness in this case because there was not disclosed here any practice which tended to hinder competition or create monopoly or which was characterized by deception, bad faith, fraud or

oppression. The Court also agreed that not all practices which are opposed to good morals or public policy amount to unfair methods of competition. The decision is then summed up in two short paragraphs (R. 375-6) which for convenience respondent quotes at this point (63 F. (2d) 83):

> The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. Other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner. The testimony shows that a decided majority of candy manufacturers did in fact use similar methods. There is nothing in the petitioner's practices tending to hinder competition or create monopoly.
>
> The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer. Display cards sent by the petitioner to accompany the merchandise contain a complete, fair, and accurate description of the sales plans. The consumer receives a piece of candy for his cent and, although he knows that the quantity is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for his opportunity to obtain a prize.

The dissenting opinion of Mr. Justice Woolley, respondent feels, is amply answered by the majority opinion below and by this brief. Specific portions of that opinion are commented on hereinafter as appears appropriate to the discussion of particular phases of the case.

(d) *Reply to Argument of Commission as to Unfair Methods.*

In opening its statement, the Commission states that this is a test case, and by a footnote indicates that 64 complaints have issued against other candy manufacturers charging them with using similar methods of sale. In the light of the later showing in that brief, supported by the evidence (R. 324), that 380 manufacturers out of the 450 members of the National Confectioners Association or 85 per cent, manufacture "break and take" candies, respondent is led to wonder why no complaints have been issued against the remaining 315 manufacturers of these goods. In any event, the present is no novel situation. Numerous cases in which orders of the Commission to cease and desist have been reversed were test cases in which the entire industry was interested, as for example *Federal Trade Commission v. Gratz*, 253 U. S. 421; *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463, and *Berkey and Gay Furniture Company v. Federal Trade Commission*, 42 Fed. (2d) 427. Respondent is confident the pendency of the other complaints will merely increase the care of this Court to see that the Commission does not overstep the bounds of its limited statutory jurisdiction.

The statement and brief of the Commission evinces a consistent attempt to prejudice this Court by continuous use of the terms "lotteries" or "lottery devices" in describing the "break and take" or prize assortments manufactured and sold by respondent. Respondent submits such descriptive language, grafted on to the case by the Commission, should be entirely disregarded and the practices of respondent considered for what they are, as properly described in the complaint (Paragraph Two, R. 3-5).

In its argument on the subject of "unfairness" the Commission endeavors to avoid the doctrine of the *Gratz* case by the contention that the enumeration in that case of "deception, bad faith, fraud or oppression" was not intended

to be exhaustive and then contends that the term "unfair methods of competition" was intended to provide a "broad, flexible, all-inclusive standard." (p. 23) The Commission then endeavors to include within the inhibition of the statute the sale of "break and take" assortments merely because, it is alleged, that they are opposed to good morals or are against public policy. No significance whatever is attached by the Commission to the qualifying expressions used by the court in its definition of unfair methods of competition in the *Gratz* case. Clearly, when the court said *"good morals because characterized by deception, bad faith, fraud or oppression"*, it was speaking with a purpose to limit the application of the statute and it did not go on record as holding broadly, as the Commission argues, that *all* practices opposed to good morals generally are unfair methods of competition. Likewise, when the court spoke of "practices *against public policy because of their dangerous tendency unduly to hinder competition or to create a monopoly*", the qualifying phrases used must be recognized and given full weight. Here again the Commission's argument would tend to the conclusion that any practice against public policy, no matter on what ground is proscribed by the statute. This is an evident misconception of the court's decision, which held that it is only that public policy aimed at the prevention of monopolies and undue restraints on competition which can be invoked under the Federal Trade Commission Act. Thus we come to a most important phase of this case, viz., that mere illegality and mere opposition to public policy are not enough to vest jurisdiction in the Commission, but there must be illegality based on deception of the public or there must be a practice against public policy by which competition is restrained or monopoly is created. The Commission goes the whole limit, in its argument as it must, to sustain an order to cease and desist in this case. No court has ever adopted such a broad construction of the Federal Trade Commission Act and respondent is confident

no court ever will. Under its interpretation the Commission could prosecute all offenses committed in business relations, as distinguished from personal relations, if interstate commerce were involved. Put somewhat differently, the essence of the contentions of the Commission in this case is, since there was not even a charge of monopoly or deception, that it has jurisdiction merely because of the alleged illegality of, or contravention of public policy by, respondent's sales policy. The Commission stands or falls upon the soundness of the proposition but reference to the careful safeguards with which the Court in the *Gratz* and later cases has surrounded its definition of the term "unfair method of competition" is all that is necessary to show that this position of the Commission is basically false.

In its effort to avoid the effect of the *Gratz* case, the Commission places reliance in its brief on the statement by this Court in *Federal Trade Commission v. Raladam Company, supra,* p. 648, that the phrase "unfair methods of competition" belongs to that class whose meaning and application must be arrived at by the gradual process of judicial inclusion and exclusion. Respondent does not assail this position; but certainly this language of the court, while clearly applicable to the statute, is not applicable to the statement of its meaning by this Court in the Gratz case. That judicial definition of the phrase still stands and has not been amplified. This showing is a complete answer to the argument of respondent on pages 22-26 of its brief.

Furthermore, realizing perhaps that its attempt to broaden the doctrine of the Gratz case will fail, the Commission now argues, despite the absence of any such charge in the complaint or any findings to justify the contention, that this case does disclose the existence of "bad faith", within the Gratz case. It is a sufficient answer to state that the argument is not founded on any testimony nor encompassed within the pleadings. It was expressly disclaimed by counsel during the taking of the testimony (R. 70, 71). These comments apply with equal force to the further attempt

to meet the Gratz opinion, when the Commission asserts as it did for the first time in the court below, that respondent's sales plan has a tendency to hinder competition or create monopoly. It is indeed too late to make such charges for the first time in the Commission's brief in the courts, as pointed out in *Philip Carey Manufacturing Company v. Commission*, 29 Fed. (2d) 49. These charges can not be seriously considered. The testimony shows that truthful display cards are furnished with each prize assortment, setting forth the plan of merchandising involved. See, for example, Commission's Exhibit No. 5 (R. 357), being display card furnished with the assortment known as "1-2-3 Big Chief 60's." The display cards furnished with the other two assortments involved, being Commission's Exhibit No. 2 (R. 351) and Commission's Exhibit No. 9 (R. 365), are also in all respects true and correct. While the Commission suggests (pp. 29, 30) that these last two display cards should set forth the number of prize-winning pieces in the several assortments, the absence of such information on the cards is largely immaterial, for it is probable such information would be ignored by the purchasers, as brought out in the final sentence of footnote on page 30 of the Commission's brief. However, if the court should consider this omission significant, respondent will make the necessary revision of its display matter.

The testimony indicates that the quality of the merchandise is the same as in staple goods but the quantity is diminished to cover the cost of the prizes. It further indicates that there is as much interest in the chance for a prize as in the merchandise itself (R. 110). But is there anything inherently wrong in that? If the child spent his money in a penny arcade for the chance to shoot an electric pistol, or to receive a card foretelling his future or even to work a device whereby a few sugar coated licorice candies are obtained, and maybe a toy motor car or other prize, he is amused and satisfied; but is the Commission to step in and insist this trade be diverted to a purely merchandising transaction

minus the element of amusement? The Trade Commission Act did not so contemplate. It might just as well be said the Commission could stop one hotel from having orchestral music during dinner, because the customer undoubtedly pays therefor in his bill, when another hotel without an orchestra serves a better meal at the same price.

On page 21 the Commission indicates that the view of the Court below, that respondent's practices did not hinder competition under the *Gratz* case was founded on the fact that other competitors could do the same thing as respondent. However the opinion of the Court below goes further, pointing out that not only could other candy manufacturers obtain their share of the penny trade by the same methods and on an equal footing with the respondent, but that the testimony shows that "a decided majority of candy manufacturers did in fact use similar methods." The same remarks apply to the further statement by the Commission in reference to the opinion of the Court below, that in answering the contention the practices are unfair and they constitute a breach of good morals, the Court said "there was nothing in the case to show deception, fraud or bad faith affecting competitors or the ultimate consumer." Here again the Court below gave its definite reasons for its conclusion, *i. e.*, that the display cards with which respondent accompanied its merchandise contained "a complete, fair and accurate description of the sales plan." Furthermore, that the consumer received a piece of candy for his cent, and though he realized the quantity received was less than if he bought straight goods, he was satisfied to deprive himself of the difference in bulk in exchange for his opportunity to win a prize.

The Court therefore refused to adopt the Commission's contention that this practice was unfair under the Act merely because it was alleged to be contrary to public policy or illegal.

The respondent is reminded by the Commission's comments on the opinion below of the language of Judge Deni-

son of the Circuit Court of Appeals for the Sixth Circuit in his separate opinion in *L. B. Silver Company v. Federal Trade Commission,* 289 Fed. 985, 992-3:

> In this matter, as in many others currently familiar, the Commission has adopted the theory that the "unfair methods of competition" denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. The vista of business censorship seen through such an opening is limitless. It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred, for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics * * * I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations.

Expressions to the same effect are found in numerous cases. For example in *New Jersey Asbestos Company v. Federal Trade Commission,* 264 Fed. 509, where the Circuit Court of Appeals for the Second Circuit reversed an order of the Commission holding that the entertainment of customers by employees held no public interest, since the practice did not constitute fraud, it was said at page 511:

> "* * * So broad a construction of the statute would bring within the disposition of the commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the government."

The quotations by the Commission on page 24 of its brief from the legislative history of the Federal Trade Commission Act, torn from their context, would indicate a very broad construction of the term "unfair methods of competition," but such was not intended by the Congress. It aimed only at those practices which tended to restrain trade or create monopoly as this court has heretofore declared. *Federal Trade Commission v. Raladam Company, supra.* This ruling is clearly borne out by the portion of the Conference Report immediately preceding the paragraph quoted, as set forth in the Appendix to this brief, page 55.

The Commission states on page 22 of its brief that it will show at pages 27-34 that respondent's practice tends to hinder competition or create monopoly, but by reference to those pages the showing appears to be all on the point of deception which has been already answered above. And too respondent notes that the grounds of unfairness summarized on pages 27-28, in paragraphs enumerated 1, 2 and 3 are all arguments directed toward the mere ethics of the sales methods. Reference is made to the findings in support of several of these grounds, but as shown by respondent's statement of this case (pp. 3-9) there is contradiction in the testimony on nearly every material fact.

The Commission asserts that the candy in the prize assortments is either smaller in size or "poorer in quality" than straight goods and emphasis is placed on this alleged fact in its argument for a reversal of the order of the Court below. The above noted confusion between the respondent on the one hand and the entire industry, which is not before the Court in this case, on the other, is also indicated here. Finding Eleven states the candy in the "break and take" packages of "all manufacturers" of that type is smaller in size or poorer in quality than straight goods. But the testimony on this is not unanimous. One witness testified (R. 223) that "there are very fine grades in this 'break and take'; lots of very fine bars in them; we for one

use the best bars—full sized bars—regulation size a nickel would buy".

The true situation as respecting respondent appears in Paragraph 12 (R. 21), namely that the quality of the candy in respondent's "break and take" packages is the same as in the case of "straight goods" but the quantity is less to compensate for the value and weight of the prizes. Another manufacturer testified to the same effect in respect of his product (R. 147). Respondent suggests that obviously all penny candy may not be as high grade as the more expensive kinds, but it must and does conform to all Federal and State laws, whether sold in prize assortments or otherwise; obviously, it is therefore pure and wholesome and no question of any injurious effect on the health of consumers can arise. After all the problem of whether children shall be permitted to purchase certain goods or assortments of candy or indeed any candy at all is one for the individual home and parent, and not for the Federal Trade Commission. Doubtless medical testimony could be obtained to show that the health of children would be improved if they were not permitted any penny candy. Certainly the Commission would not seek to eliminate the entire penny candy industry of the United States.

Citation is made of a number of cases arising under the Federal or State lottery laws, but we look in vain for any reference in such statutes to "unfair methods of competition," nor have any cases been pointed out in which lotteries have been held within the scope of the Federal Trade Commission Act. Indeed, the case of *Holoman v. State*, 2 Tex. Ct. App. 610, cited by the Commission, discloses that, contrary to the instant case, where the merchandising feature is predominant and the sales plan is merely incidental to effect the sale of the candy, the candy was sold at 50 cents a box merely as a cloak for an outright lottery, the fortunate purchaser obtaining a prize of $10 in money or jewelry. The Commission throughout its brief argues

that the prize assortments constitute lotteries. But from footnote on page 32 we observe that *"No claim is made that respondent violated the Federal lottery statutes."* Why, respondent inquires, if these are lotteries under numerous state laws as contended, do we find 85 per cent of the members of the National Confectioners Association being permitted to continue the manufacture of such packages? Certainly in but few states have any such rulings been handed down. *But whatever may be the application of State criminal statutes, the important fact is that the Commission has absolutely no authority to enforce those statutes.* That was made clear by the reasoning of this court in *Hammer v. Dagenhart,* 247 U. S. 251.

The Commission has not even attempted to say that in the so-called lotteries here in question, the public is misled or deceived, but solely that all members of the public may not receive the same value for their money. This is not deception or misrepresentation, for all realize that the prizes can go only to the few.

If the Congress had intended that the sales methods here involved should be deemed "lotteries" and prohibited as such, it could have enlarged the scope of the anti-lottery legislation which has existed since the passage of the Act of March 2, 1895 (28 Stat. 963). That Congress has not done so is a clear indication that it did not intend to reach this type of merchandising as distinguished from lotteries.

A mere desire by [redacted] minority candy manufacturers, to prevent the use of [redacted] thods for the alleged reason that gambling among children is promoted thereby, and that the Commission is willing to participate in this "movement", still does not sufficiently relate it to the Government's policies as expressed in the anti-monopoly acts to vest jurisdiction in the Commission.

The Commission, as has been repeatedly held, was not organized as a business panacea or cure-all for the ills of trade, and we confidently maintain that the Commission has no jurisdiction over practices such as here involved because

it has no power to broadly prevent gambling, if this be gambling, just as it has no power broadly to prevent theft or murder. These practices have no relation to the anti-trust or anti-monopoly policy of the government. Instead the case is governed by the view of this Court in the *Raladam* case (p. 654) that whether the respondent "was subjecting itself to administrative or other proceeding" under the Food and Drug Act need not be inquired into, for the administration of that act was not committed to the Federal Trade Commission. By the same token, we are not in any way concerned here with whether respondent is amenable to the Federal or State anti-lottery laws. The Commission has no jurisdiction to enforce those acts, and, respondent insists, the Commission is unjustifiably attempting to usurp the functions of other agencies, state and federal, created for their enforcement. The Commission has here departed from the purpose of its creation and is attempting to interfere with the police power of the several states. There have doubtless been many instances in which free competition has been hindered by unfair methods, such as strikes, sabotage, and the like; but no one has ever contended that the Commission was organized to deal with these types of business coercion. Equally the Commission has no authority to enforce anti-lottery or gambling statutes.

The showing made herein of the rapid growth of the sale of penny goods to chain stores which do not sell "break and take" assortments and the corresponding drop in the sales to independent retailers over the past several years, is abundant proof that the independent retailers, striving to eke out a meager livelihood through the sale of this "break and take" merchandise deserve protection rather than deprivation of this source of business. The official publications of the Department of Commerce of the United States of which this Court takes judicial notice, show the great growth in sales of candy to chain stores over the pe-

riod from 1929 to 1931 and the corresponding decrease over this period of sales to independent retailers. These figures appeared in respondent's brief in opposition to the petition for writ of certiorari, pages 12 and 13.

The Commission places reliance on the case of *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483. But the context of the opinion in that case shows that the court was dealing exclusively with the subject of misbranding or mislabeling, which resulted in the public being misled to its disadvantage. This the Commission admits on page 36 of its brief. The showing of false labeling in the Winsted case is utterly unlike the present case, where the practice not only has been employed by a great majority of the candy industry for many years (85 per cent of the candy manufacturers (R. 324), and 99 per cent of the wholesalers and jobbers, exclusive of those serving chain stores (R. 73),) until it has become a recognized institution in the sale of low priced candies, but the method pursued has in it nothing of that inherent fraud and deception which is the basis of the decisions of the courts against misbranding.

Under the state of the law as shown, and upon the record made in this case, respondent submits the Commission is here seeking an unjustified and dangerous extension of the principle of "unfair methods of competition"—unjustified because not supported by the long accepted interpretation of the statute; and dangerous—because it shows an attempt unlawfully to encroach on the functions of other regulatory agencies, federal or state, and to assume a paternalistic control over all types of business practices in commerce. A similar effort by the Commission to acquire a jurisdiction not contained in the organic act was frustrated by this Court in *Commission v. Raladam Co., supra*, where is declared in no uncertain terms the inability of the Commission or of the courts to enlarge the jurisdiction of the former. The instant case, respondent submits, is just another

attempt of the Commission to "merely assume" an unconferred jurisdiction.

II. The Issuance of the Complaint in this Case Was Not to the Interest of the Public as Required by the Federal Trade Commission Act.

This Court has frequently stated that the public interest referred to in the Federal Trade Commission Act, must be "specific and substantial" (*Federal Trade Commission v. Klesner, supra,* p. 28, and *Federal Trade Commission v. Raladam Company, supra,* p. 649); and must be an interest *based on deception or fraud, i. e. the public must be misled or deceived to its disadvantage;* or the interest must arise from *a direct tendency to create a monopoly.* For instance, in *Commission v. Raladam Company, supra,* p. 647, it is stated that one of the fundamental questions in a proceeding under the Federal Trade Commission Act is whether the methods "tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein' ". Again, in *Commission v. Sinclair Refining Company,* 261 U. S. 463, where it was held that the furnishing by oil refiners to dealers of pumps at nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition. In its opinion the court said (pp. 474-475):

> Is the challenged practice an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act? * * * Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud or oppression. *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427.

In the case of *Commission v. Winsted, supra,* the Supreme Court made the significant comment on page 494 that "as a substantial part of the public was still misled by the use of the labels which the Winsted Company em-

ployed, the public had an interest". Thus there must be deception which misleads a substantial part of the public before there arises "public interest." Again, see the case of *Berkey and Gay v. Commission, supra,* where it was held following the opinion of the Supreme Court in the *Gratz* case, there must be some practice "characterized as deception, fraud or even unfairness" and "that injury to public interest is thereby shown".

The Commission has admitted in the Record (pp. 70-1) repeatedly that there is no false advertising, that there are no misleading statements and that there is no intention to deceive the purchasers by the "break and take" candy. The consumers of this penny goods know precisely by what method of retailing the candies are being disposed of, the size of the candies they are purchasing, and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness, but on the contrary explicit information is available to the consumers in carefully prepared and truthful display cards.

Nor is there any charge or evidence of monoply for the record shows eighty-five per cent of the candy manufacturers employ the same sales methods as respondent and compete on an entirely equal basis. Of the remaining 15 per cent several manufacture a product which is not suited to the sales plan complained of but those who refrain from using that plan do so voluntarily and not because of any coercion by respondent. Respondent places no restriction on other candy manufacturers to dispose of their merchandise as they desire, or any restriction upon the right of their wholesaler and jobber customers to handle the product of any other manufacturer. Thus there is no specific and substantial injury to competitors within the meaning of the Federal Trade Commission Act. No restraint of trade is evident here. On the contrary, the record shows that through the "break and take" assortments the small in-

dependent candy merchant and storekeeper is enabled to survive disastrous chain store competition which has a virtual monopoly of "straight" candy sales, from their ability to buy in bulk and undersell. *To withdraw these pieces from their shelves, would result in forcing many of these small merchants out of business. The trade which they now command would revert to the larger retailers or chain stores and concentrate in a relatively few hands the bulk of the penny candy trade.* (R. 68.) These chain stores buy from manufacturers of "straight" goods and are directly interested with them in eliminating the competition of respondent and others in like situation through the order of the Commission made in this proceeding. Thus this is an attempt by the small minority of the candy manufacturers to control the industry to their financial advantage and the financial advantage of their large customers, the chain stores and thus *the Commission's order would directly tend to produce that condition of monopoly, which the Congress sought to prevent.*

There is a decided movement in the United States to protect independent stores from the over-powering effect of chain store competition. See *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U. S. 527, and *Great Atlantic & Pacific Tea Company v. Maxwell,* 284 U. S. 575. As was said by Mr. Justice Brandeis in his dissent in *Liggett Company v. Lee,* 288 U. S. 517, 541, the Florida law there under consideration "is legislation of the type popularly called Anti-Chain Store Laws.* * * Its chief aim is to protect the individual, independently-owned, retail stores from the competition of chain stores."

Since it is admitted there is no deception in this case, the matter resolves itself to a purely private controversy between the majority and minority candy manufacturers of the country. In the case of *L. B. Silver Company, supra,* page 991, the Circuit Court of Appeals for the Sixth Circuit in the majority opinion found it unnecessary to decide whether the Federal Trade Commission had jurisdiction to

determine complaints as to unfair methods of competition where the general public, the ultimate consumer, was not misled, deceived or prejudiced thereby, but which involved only a controversy between dealers and breeders.

The findings of the Commission indicate an effort to show that the use of prizes in connection with merchandising candy is morally bad and encourages gambling, especially among children. Is this not merely applying ugly names to a simple transaction involving a comparatively small element of chance—the making of a mountain out a mole hill? But, for the sake of argument let us concede that the purchase of a piece of this candy is a sort of gambling and grant that it is important that the gambling instinct be not developed *to excess* in anyone, child or adult, nevertheless, how can it be said that the affirmance of this one order of the Federal Trade Commission will have such beneficent result? The element of chance is present in nearly all games and pastimes, particularly those of childhood, and represents much of the thrill and pleasure derived. Whether it is stealing a base in a ball game, or throwing dice in the time honored game of "Parcheesi", the element of chance is ever present. Many of the "obstacle" games so popular at Christmas and enjoyed at the family fireside are based on the chance of avoiding or incurring penalties or setbacks, determined by the spin of an arrow. How then can a certain development of the gambling instinct be avoided, and who would deprive the child of the pleasure and profit to be derived therefrom.

Educators and sociologists of recognized standing take the view that not only is the element of chance indispensable in the proper development of the individual but is a great recreative force. Note the following from the American Journal of Sociology, Vol. 7, p. 760, from Article entitled the "Gambling Impulse":

> The instinct is born in all natural persons. It is one expression of a powerful reflex, fixed far back in ani-

> mal experience. The instinct is, in itself, right and indispensable * * *.

Again from "Personality and Conduct" by Maurice Parmelee, 1918, p. 58:

> Mankind possesses a deeprooted tendency to take risks which manifests itself in the spirit of adventure and is strengthened by the desire to gain something. This human tendency has been of great social value * * *.

Further, from "Memory and Thought Series", Vol. 2, "Quickness of Perception" by E. W. Hassler, dealing with mental stimulus to be derived from games, p. 73, it appears:

> All legitimate games at cards combine chance and skill. It is the element of chance in them that makes them truly recreative, and because it renders it impossible for the most expert always to win, makes them popular for social pastime.

However, even if we should concede that it is morally bad to buy candy, hoping to find a penny therein; or to play "Parcheesi" (and incidentally the Commission has as yet filed no complaint against the manufacturers of that game), still this certainly is not the character of public interest which under the law is a condition precedent to the issuance of a valid order to desist. Decided cases amply demonstrate that the public interest required by the statute must be definitely connected with the merchandising in such a way that it be shown that the public is *deceived* or *misled* to its disadvantage—that it is not obtaining the product which it understands it is to receive. Thus we have here no proof, but, on the contrary, a specific disclaimer by counsel for the Commission of any intention or effort on the part of petitioner to deceive or mislead the public. We refer again to the record (pp. 70-1) where both counsel for the Commission and the examiner pointed out that there was no charge of any false or misleading advertising or fraud or deception

on the public. The court below ruled that no deception was shown. There can not therefore exist in this case either unfair methods of competition as defined in the statute or such public interest as is there required.

The court below, having clearly indicated the lack of unfairness, apparently felt it unnecessary to pass on the existence of any public interest which would justify the Commission's order..

When the Commission endeavored to establish a substantial and specific public interest in this proceeding it produced testimony derived solely from persons connected with the candy trade. No member of the "public" as such was called to testify; instead there were nine manufacturers of candy, two storekeepers, and five salesmen called by the Commission in this case.

What the "public" thinks of the influence of the element of chance in the games and pastimes of children is set forth above, pp. 42-43.

Since we have shown that the methods here are not unfair methods under the act, public interest—even if conceded—will not avail the respondent; but it is clear that the injury to the public interest under the *Gratz* and other cases must arise specifically from the unfairness of the methods, viz., from deception or from monopoly. Since there is no charge of monopoly here and it is conceded there is no deception, there can not be that public interest which the act presupposes. It is not all practices against morals which are condemned but those only which involve the elements of deceit or monopoly. It seems appropriate to repeat one sentence from the *Northam Warren* decision, p. 198: "In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved but also that the public are misled thereby," citing the *Klesner* decision of this court.

When the Commission argues in the last point of its brief that this proceeding is to the interest of the public, it is not there shown, as the rule established by the decisions of the

courts require, that this interest flows from any "unfairness". A vague general interest does not meet the statute. This is all on which the Commission has to rely. In fact, the principal interest shown is the desire of certain manufacturers who sell straight goods to chain stores and syndicate drug stores to eliminate the competition of those who sell "break and take" goods to independent dealers. The Act is designed to promote competition, not throttle it.

The Commission refers to a portion of the dissenting opinion of Judge Woolley below, which, after assuming the methods here in question to be unfair to children, says that if the methods of sale are unfair *either* to the purchasing children or to competitors, the Commission has jurisdiction, because the children and the competitors *each* represent a "public" under the law. This is clearly erroneous and in conflict with numerous decisions of this court. For example, see *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, where this court denied jurisdiction of the Commission because competitors were not affected, despite the presence in the case of an assumed public interest.

III. The Federal Trade Commission Has Failed to Adduce Satisfactory Proof of the Existence of a Method of "Competition" in Commerce.

The section, as pointed out by this Court in *Federal Trade Commission v. Raladam, supra,* p. 647, was designed "to stop in their incipiency those methods of competition embraced under the term 'unfair' ", which purpose presupposed that among the prerequisites to jurisdiction in the Commission to issue a proper order to cease and desist was that the methods involved be "methods of *competition* in commerce", Ibid, p. 649.

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors

> —that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

This court accordingly held in the *Raladam* case that the Commission could not order a manufacturer of an obesity remedy to desist, where it was not shown that there were competitors who might be injured by the practices of the company.

The Court commented in the *Raladam* case that no finding or evidence showed substantial injury to the business of any competitor or of competitors generally. "None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business." The only evidence in that case concerning the existence of competitors came from medical sources with some slight evidence of the purchase of anti-fat treatments by one witness. The Court then continued (p. 653):

> * * * It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market. All this was left without proof

and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission.

The instant case shows no more substantial testimony that respondent's practice is a method of "competition" under the Federal Trade Commission Act than was present in the *Raladam* case. The proof shows an absence of a substantial number of competitors affected by the methods criticized. The evidence before the Federal Trade Commission shows that the great majority of the candy manufacturers of the United States employ the distribution methods of which the Commission complains in this proceeding. 380 out of 450 active members of the National Confectioners Association manufacture and sell "break and take" candies, (R. 324) *i. e.*, only 15 per cent of the candy manufacturers in the Association fail to employ these distribution methods, while 85 per cent of the candy manufacturers engage in the sale of candies through the use of the same methods that the Commission is seeking to compel respondent to cease. These methods have been recognized factors in the distribution of the so-called "penny goods" candy for many years. Furthermore, the record discloses that of the 15 per cent who fail to employ these methods some did so because their type of merchandise was not suited to this sales plan (R. 101, 270).

The courts are loath to interfere with accepted methods of competition which have been recognized in the particular trade or business over a long period of years. In *Federal Trade Commission v. Gratz, supra,* this Court set aside an order of the Federal Trade Commission requiring parties to desist from a course of business on the ground, among others, that the sales practice there complained of represented the custom in the trade. In *Berkey & Gay Furniture Co. v. Federal Trade Commission,* 42 Fed. (2d) 427, the Circuit Court of Appeals for the Sixth Circuit pointed out early in its opinion, in which it reversed the order of the

Commission, as a significant fact, that "the practice is substantially universal". In *New Jersey Asbestos Company v. Federal Trade Commission, supra,* it was noted that the practice there involved was a business incident of long standing.

Furthermore, the Commission has no function to protect the majority of candy manufacturers who are all employing the same methods, from one another (*Commission v. Raladam Company, supra*) nor is the Commission justified in preventing the use of a long-standing trade method for the benefit of the minority who, having the opportunity of employing the same trade method, refuse to do so. The minority have elected the basis upon which they will compete, and can not complain if their competitors are not brought down to a common level with them. In *Commission v. Sinclair Refining Company*, 261 U. S. 463, it was said (pp. 475-6):

> The powers of the Commission are limited by the Statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition.

There is a very fundamental reason why the courts hesitate to disturb well recognized business practices long indulged in by the majority of those in the trade, namely that there is a lack of any substantial competition. This is exactly the situation here. The majority of the candy manufacturers make the assortments involved, and it is only the small minority who are complaining.

Attempt is made by the Commission to argue that a small minority of those engaged in business might constitute sufficiently substantial competition to meet the statute, but the quotation from the *Raladam* opinion on page 38 of the Commission's brief does not bear out that contention. In any event, the competition proven is too insubstantial to

warrant the affirmance of an order which would deprive respondent of 60 per cent of its manufacturing business.

From the record (p. 341) it appears the Trial Examiner found in paragraph IX of his report:

> There is no evidence in the record that any competitor of the respondent has been injured in his business by reason of the "Break and Take" product manufactured and distributed by respondent, other than that which shows that the business of all candy manufacturers who make only "Straight Goods" is injured by all "Break and Take" goods on the market.

The Commission found exactly to the contrary (Paragraph Nine, p. 19). But while respondent recognizes that the findings of the Commission as to facts, if supported by testimony, are conclusive, the existence in a given case of a method of "competition" is not factual but, as is clearly apparent from the opinion of this Court in the *Raladam* case, a legal concept or conclusion to be drawn from primary facts. In any event, as indicated by this Court in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568, 580, the Court has "power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission."

Manifestly, the existence of any substantial competition between respondent's product, and that of competitors has not been shown, and it is not for this Court to conjecture that the Commission could have produced such competitors. On this record, respondent submits, it has not done so.

IV. Respondent's Candy Assortments Were Not Articles of Interstate Commerce at the Time of the Employment of the Sales Methods in Question.

The Commission has never made any attempt to control the sale of candy by retailers, for the very evident reason that these sales are not made in interstate commerce. But

it is the methods used by retailers in their sales to customers of which the Commission complains. Respondent's goods are delivered to the retailers in cartons, and the Commission has found as a fact, in Paragraph 8 (R. 18), that all sales made by respondent herein "are absolute sales" and it "retains no control in any manner over the goods after they are delivered to the wholesale dealer or jobber * * * ".

Under these circumstances the argument that the Commission has jurisdiction over the manner in which respondent sells its product is a strain on the term interstate commerce. There is no contention that the use of prize features plays a part in respondent's sale of its goods to wholesalers or in the sale of such goods by the wholesalers to retailers. The Commission's contention is based on the fact that these retailers who are in no way controlled by respondent, conducted their sales in such manner that they might be said to be operating a lottery. Sales to the consumer are conducted by retailers wholly within the various States and are in no way connected with interstate commerce. Over them the Commission has no jurisdiction.

Again, if the position of the Commission were given full effect, it would result that the sale of any article which was capable of any improper use would have to be restrained; but no one would contend—not even the Commission—that it could enjoin the sale of any product just because it could be used in a way to break the law, deceive the public, or with other unfortunate results. Are the manufacturers of dice, pistols, playing cards, roulette wheels or backgammon boards to be held responsible for the use by others of the articles they manufacture on the ground that this constitutes "unfair competition" on their part? This would be palpably absurd. Since their business operations do not violate the law, no responsibility attaches to them for what remote purchasers may do with their product.

Further, the Federal cases are all opposed to the Commission's position. For example, see *Kinney-Rome Co. v.*

Federal Trade Commission, 275 Fed. 665, where the Commission sought to compel the petitioner there to cease its practice of giving premiums to salesmen employed by retailers handling its goods. The order was reversed, the court stating (p. 669):

> The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered. It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame, and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with the other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public. It needs no discussion to show that that was wholly his competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to any one who does not own the goods.
>
> Likewise the public, if it has an interest in competition has such interest only in the competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

V. The Commission Exceeded Its Jurisdiction When it Attempted in Its Order to Interfere With Certain Steps in Respondent's Business Which Constituted Manufacture, as Distinguished from Commerce.

This point refers to Paragraphs 4 and 5 of the order of the Commission, whereby respondent is ordered to cease and desist from:

> (4) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape and quality containing within their wrappers tickets bearing different prices, or bearing the word "free", or phrases containing said word.
>
> (5) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of chocolate-covered candy of uniform size, shape and quality, having centers of different color, together with larger pieces of candy, or articles of merchandise, which said larger pieces of candy, or articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

The complaint in this case does not cover the packing or assembling of the assortments of candy except in the most general language. In any event it is indisputable that the "packing or assembling" of respondent's goods in a certain manner is all conducted within the confines of the state in which the factory is located, and hence would not in itself constitute interstate commerce. The "packing or assembling" of respondent's goods is "manufacture" as distinguished from "commerce", as is clearly brought out in the case of *Utah-Idaho Sugar Company v. Federal Trade Commission,* 22 Fed. (2d) 122, where numerous authorities directly in point are cited, including the case of *Kidd v. Pearson,* decided by the Supreme Court at 128 U. S. 1. Hence the Commission transcended its authority in including these paragraphs in its order.

Furthermore, the Commission has no jurisdiction to interfere with the intrastate business of respondent. Nor could the Congress under the commerce clause vest the Commission or any Federal agency with any such jurisdiction. Manufacture and sale in the state of Pennsylvania of these prize assortments can still be carried on by respondent, it is submitted, even should this court sustain the Commission's order in other respects. Obviously, therefore, the Commission cannot issue an order directed against the preparation by respondent of its prize assortments, and paragraphs 4 and 5 thereof must in any event be set aside.

The Commission did not contest this contention of respondent in the Court below.

CONCLUSION.

Counsel for the Commission have labored diligently to work up a case of jurisdiction; but, lacking a suitable foundation therefor in a charge of monopoly or deception, bad faith, fraud or oppression in the complaint, and proof thereof in the testimony, have been compelled to rely vaguely on good morals and public policy. But the Commission has no general jurisdiction of such matters. The existence of none of the three indispensable elements of "unfair methods," "public interest" or substantial "competition" has been shown.

As was said in the case of *Northam Warren Company v. Federal Trade Commission, supra,* and quoted by the Court below, "The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals". The decision of the Court below is correct and its judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Legislative History of the Federal Trade Commission Act.

The act was enacted in response to a message of President Wilson delivered January 20, 1914, on the subject of anti-trust legislation, from which message we quote in part as follows (italics ours):

> The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning *of the existing antitrust law*. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the *actual processes and methods of monopoly* and of the many hurtful *restraints of trade* to make definition possible, at any rate up to the limits of what experience has disclosed. * * *
>
> * * * * * * * * *
>
> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. * * * (Senate Report 597, pp. 6-7.)

The following from Senate Report 1327, 62nd Congress, 3rd Session, on Senate Resolution 98, which authorized the holding of hearings by the Committee on Interstate Commerce, preliminary to drafting a Trade Commission bill, is in point (p. 33) (embodied in the appendix in Senate Report No. 597):

> * * * It is believed that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the

> law for months or years after the violations occurred and when the difficulty of awarding reparation for the wrong is almost insurmountable.

The Senate Report, No. 597, 63rd Congress, 2d Session, quoted from in part in footnotes to the dissenting opinion of Justices Brandeis and Clarke in *Federal Trade Commission v. Gratz, supra,* 431, also discloses the type of practice which was within the purview of the act, where the examples of unfair practices cited are "local price cutting, interlocking directorates and holding companies intended to restrain substantial competition". While, of course, not all inclusive, these examples disclose the type of practice which was prohibited and that it must substantially restrain competition.

From the Statement of the Managers on the part of the House, to Conference Report, H. R. Report No. 1142, 63rd Congress, 2nd Session, pp. 18 and 19, it appears:

> Section 5 declares unfair methods of competition to be unlawful and empowers the commission, after hearing, to order the discontinuance of the use of such methods.
>
> It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to businesss, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.

Further passages from these reports were embodied in the above-mentioned footnotes to the dissenting opinion of Justices Brandeis and Clarke in *Federal Trade Commission v. Gratz, supra,* pp. 433-6.

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1933.

Federal Trade Commission, Petitioner, *vs.* R. F. Keppel & Brother, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, 290 U. S. —, to review a decree of the Court of Appeals for the Third Circuit, which set aside an order of the Federal Trade Commission forbidding certain trade practices of respondent as an unfair method of competition. 63 F. (2d) 81; § 5, Federal Trade Commission Act, 28 Stat. 717, 719.

The Commission found that respondent, one of numerous candy manufacturers similarly engaged, manufactures, sells and distributes, in interstate commerce, package assortments of candies known to the trade as "break and take" packages, in competition with manufacturers of assortments known as "straight goods" packages. Both types are assortments of candies in packages in convenient arrangement for sale by the piece at a small price in retail stores in what is known as the penny candy trade. The break and take assortments are so arranged and offered for sale to consumers as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a

few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, penholder and ruler. Each assortment is accompanied by a display card, attractive to children; prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior quality. Much of the candy assembled in the break and take packages is sold by retailers, located in the vicinity of schools, to school children.

The Commission found that the use of the break and take package in the retail trade involves the sale or distribution of the candy by lot or chance; that it is a lottery or gambling device which encourages gambling among children; that children, enticed by the element of chance, purchase candy so sold in preference to straight goods candy; and that the competition between the two types of package results in a substantial diversion of trade from the manufacturers of the straight goods package to those distributing the break and take type. It found further that in some states lotteries and gaming devices are penal offenses; that the sale or distribution of candy by lot or chance is against public policy; that many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children; and that such manufacturers are placed at a disadvantage in competition. The evidence shows that others have reluctantly yielded to the practice in order to avoid loss of trade to their competitors.

The court below held, as the respondent argues here, that respondent's practice does not hinder competition or injure its competitors, since they are free to resort to the same sales method; that the practice does not tend to create a monopoly or involve any deception to consumers or the public, and hence is not an unfair method of competition within the meaning of the statute.

Upon the record it is not open to question that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it. If the practice is unfair within the meaning of the Act, it is equally clear that the present proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, "in the interest of the public". The practice is carried on by forty or more manufacturers. The disposition of a large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit. Sales of the break and take package by respondent aggregate about $234,000 per year. The proceeding involves more than a mere private controversy. A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy industry. A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216. Compare *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 28. Hence we pass without further discussion to the decisive question whether the practice itself is one over which the Commission is given jurisdiction because it is unfair.

Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 652; *Federal Trade Commission* v. *Royal Milling Co., supra*, at 217. But we cannot say that the Commission's jurisdiction extends only

to those types of practices which happen to have been litigated before this Court.

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See *Federal Trade Commission* v. *Raladam, supra,* 649, 650. But as this Court has pointed out it also had a broader purpose, *Federal Trade Commission* v. *Winsted Hosiery Company,* 258 U. S. 483, 493; *Federal Trade Commission* v. *Raladam Company, supra,* 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition" to be unlawful.[1] But it was because the mean-

[1]The Senate Committee on Interstate Commerce, in recommending the bill in its original form, seems to have adopted the phrase "unfair competition" with the deliberate purpose of giving to the Commission some latitude for dealing with new and varied forms of unfair trade practices. The Committee said in its report of June 13, 1914, Senate Report No. 597, 63rd Cong., Second Session, page 13:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

. . . . . .

"It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no

ing which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted.[2] Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual

more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

Senator Newlands, in introducing the bill for the Committee, emphasized this feature. In answering the criticism that the phrase "unfair competition" lacked definition he said, 51 Cong. Record, 11084:

"Our answer to this is that it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be. Germany does not hesitate by law to condemn practices in business that are *contra bonos mores*. It leaves their tribunals to determine what practices are against good morals.

. . . . . .

"It is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow. If we should attempt to define all the trade practices that can be devised, that would create dishonest advantage in competition, we would undertake a hopeless task."

[2]The phrase "unfair methods of competition" was substituted for "unfair competition" in the Conference Committee. This change seems first to have been suggested by Senator Hollis in debate on the floor of the Senate in response to the suggestion that the words "unfair competition" might be construed as restricted to those forms of unfair competition condemned by the common law. 51 Cong. Record 12145. The House Managers of the conference committee, in reporting this change said, House Report No. 1142, 63rd Congress, 2nd Sess., September 4, 1914, at page 19:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

process of judicial inclusion and exclusion' ". *Federal Trade Commission* v. *Raladam Company, supra,* 648; compare *Davidson* v. *New Orleans,* 96 U. S. 97, 104.[3]

The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in *Federal Trade Commission* v. *Winsted Hosiery Co., supra;* compare *Federal Trade Commission* v. *Algoma Lumber Co.,* 290 U. S. —, —. There it was specifically held that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods "Natural Wool," as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to

[3]References showing the details of the legislative history of the Act may be found in Handler, The Jurisdiction of the Federal Trade Commission over False Advertising, 31 Columbia Law Review 527; Montague, 'Unfair Methods of Competition', 25 Yale Law Journal 20; Henderson, The Federal Trade Commission, c. I.

what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair". See *Federal Trade Commission* v. *Royal Milling Co., supra,* at 217; *Federal Trade Commission* v. *Algoma Lumber Co., supra,* at —.

While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, *Federal Trade Commission* v. *Gratz, supra,* in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected", and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience". Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9, 11. See *Federal Trade Commission* v. *Beechnut Packing Co., supra,* at 453; compare *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.

We hold that the Commission correctly concluded that the practice was an unfair method of competition within the meaning of the statute. It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed.

Reversed.